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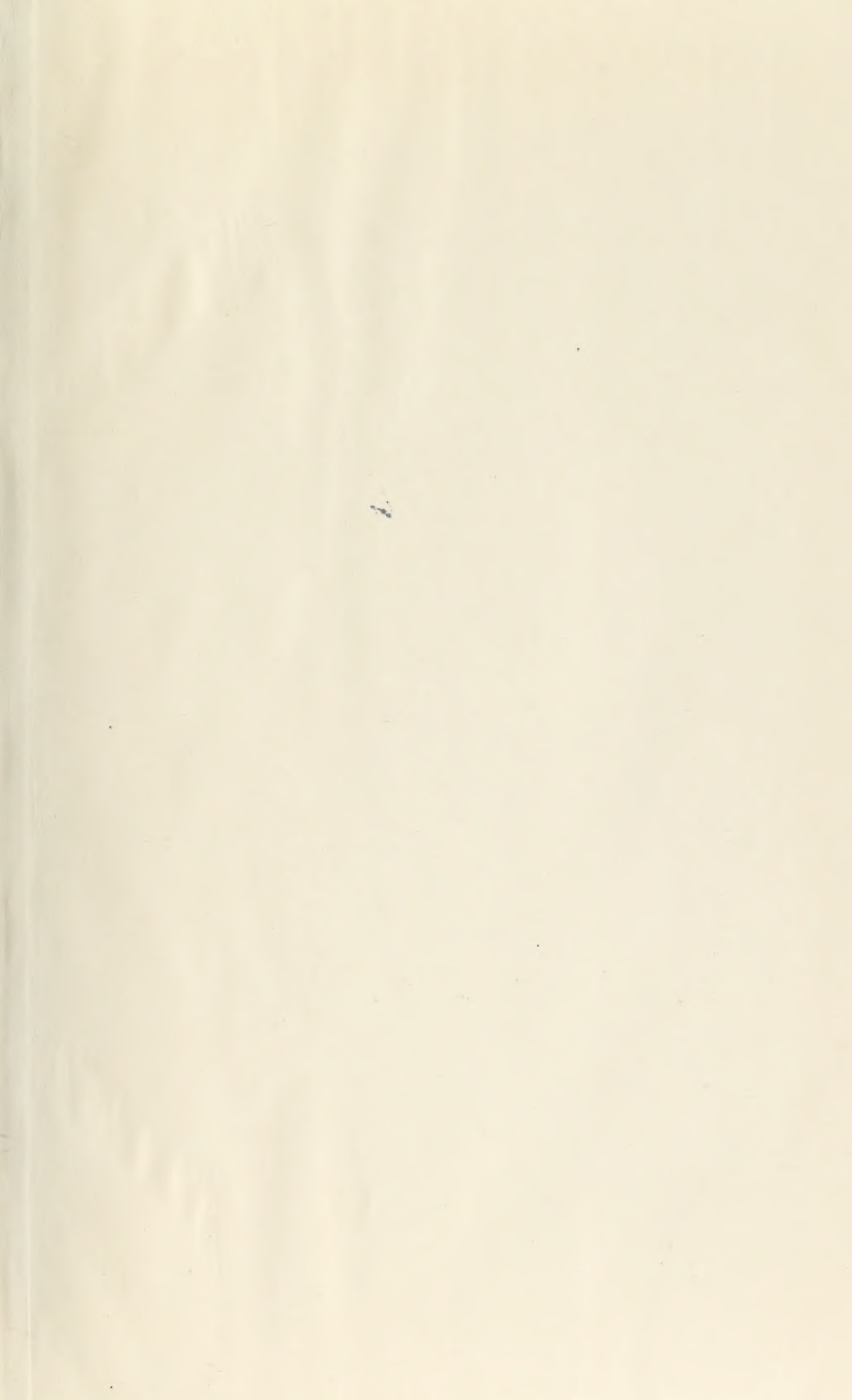
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1070
No. 2858

1070
United States
Circuit Court of Appeals
For the Ninth Circuit.

GIN DOCK SUE,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for
the Northern District of California,
First Division.

Filed

JAN 25 1917

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

GIN DOCK SUE,

Appellant,


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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

JOHN W. PRESTON, Esq., Attorney for Plaintiff
and Appellee.

GEO. A. MCGOWAN, Esq., Attorney for Defendant
and Appellant.

*In the District Court of the United States, in and for
the Northern District of California, Division
No. 1.*

No. 5493.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GIN DOCK SUE,

Defendant.

Praeceptum for Transcript of Record.

To the Clerk of the Above-entitled Court:

Sir: Please make up Transcript of Appeal in the
above-entitled case, to be composed of the following
papers:

- 1st. Original and Amended Complaint.
- 2d. Warrant of Arrest.
- 3d. Return on Warrant of Arrest.
- 4th. Order of Deportation by United States Commissioner, and Opinion Thereon.
- 5th. Notice of Appeal from Commissioner.
- 6th. Transcript of hearing on May 13th, 1915, as
the same has been transcribed and filed in
the court herein, together with copies of all
of the exhibits introduced in evidence, as

shown by the transcript of record in said hearing, including transcript of testimony given before Com. Krull.

- 7th. Judgment affirming order of deportation, and opinion thereon.
- 7½. Stipulation as to ultimate facts appearing from Immigration Record.
- 8th. Stipulation and order regarding statement of case.
- 9th. Notice of appeal.
- 10th. Petition for appeal.
- 11th. Assignment of errors.
- 12th. Order allowing bail.
- 13th. Cost bond on appeal.
- 14th. Citation and copy.
- 15th. Clerk's Certificate.

GEO. A. McGOWAN,
Attorney for Defendant and Appellant.

JNO. W. PRESTON,
Attorney for Plaintiff and Appellee.

Dated January 18th, 1916.

[Endorsed]: Filed Jan. 18, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [1*]

(Chinese Picture.)

Complaint Before Commissioner.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Before me, Francis Krull, a United States Com-

*Page-number appearing at foot of page of original certified Transcript of Record.

missioner for the Northern District of California, at San Francisco, personally appeared this day W. H. Chadney, who being first duly sworn, deposes and says, that he is an officer of the United States, to wit, an Immigrant Inspector, that one Yung Lung Soo, *alias* Chin Tock Sing, is a Chinese manual laborer and is now within the limits of the Northern District of California, aforesaid, without the Certificate of Residence required by the Act of Congress entitled "An Act to prohibit the coming of Chinese persons into the United States" approved May 5th, 1892, and the Act of Congress approved April 29th, 1902.

WHEREFORE, deponent prays that a warrant for the arrest of the said Yung Lung Soo *alias* Chin Tock Sing be issued, and that he be arrested and brought before the said U. S. Commissioner and upon a hearing being had, that he be duly adjudged to be illegally in the United States, and that the proper order for the deportation of the said Yung Lung Soo *alias* Chin Tock Sing be made and entered.

WILLIAM H. CHADNEY.

Subscribed and sworn to before me, this 18th day of January, 1913.

[Seal]

FRANCIS KRULL,

United States Commissioner as Aforesaid.

I hereby designate Francis Krull, United States Commissioner for the Northern District of California, at San Francisco, before whom Yung Lung Soo *alias* Chin Tock Sing, the Chinese person named in the foregoing complaint, shall be taken for hearing.

J. L. McNAB.

[Endorsed]: Filed January 18th, 1913. Francis Krull, United States Commissioner, North'n Dist. of California. [2]

Certified Copy, Complaint and Warrant.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Before me, Francis Krull, a United States Commissioner for the Northern District of California at San Francisco, personally appeared this day W. H. Chadney, who being first duly sworn, deposes and says, that he is an officer of the United States, to wit, an Immigrant Inspector, that one Yung Lung Soo, *alias* Chin Tock Sing, is a Chinese manual laborer and is now within the limits of the Northern District of California, aforesaid, without the Certificate of Residence required by the Act of Congress entitled "An Act to prohibit the coming of Chinese persons in the United States," approved May 5th, 1892, and the Act of Congress approved April 29th, 1902.

WHEREFORE, deponent prays that a warrant for the arrest of the said Yung Lung Soo *alias* Chin Tock Sing be issued, and that he be arrested and brought before the said U. S. Commissioner and upon a hearing being had, that he be duly adjudged to be illegally in the United States, and that the proper order for the deportation of the said Yung Lung Soo *alias* Chin Tock Sing be made and entered.

WILLIAM H. CHADNEY.

Subscribed and sworn to before me, this 18th day of January, 1913.

[Seal]

FRANCIS KRULL,

United States Commissioner as Aforesaid.

I hereby designate Francis Krull, United States Commissioner for the Northern District of California, at San Francisco, before whom Yung Lung Soo *alias* Chin Tock Sing, the Chinese person named in the foregoing complaint, shall be taken for hearing.

J. L. McNAB.

[Endorsed]: Filed January 18th, 1913. Francis Krull, United States Commissioner, North'n Dist. of California. [3]

Warrant.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

The President of the United States of America, to the Marshal of the United States for the Northern District of California, and to His Deputies, or Any or Either of Them, GREETING:

INFORMATION on oath having this day been laid before me by W. H. Chadney that the crime of Violating Act of May 5th, 1892, etc., as alleged in the certified copy of the "Affidavit of Complaint," hereto prefixed and hereby referred to and made a part hereof, has been committed, and accusing Yung Lung Soo *alias* Chin Tock Sing thereof, you are therefore commanded, in the name of the President

of the United States of America, to arrest the above named person and take him before me, or the nearest United States Commissioner, or the nearest Judicial Officer having jurisdiction under existing laws for a hearing, commitment, or taking bail for trial, that he may then and there be dealt with according to law, for the said offense.

GIVEN under my hand and official seal, at my office in the city and county of San Francisco, in the District aforesaid, this 18th day of January, A. D. 1913.

[Seal] FRANCIS KRULL,
United States Commissioner, for the Northern District of California, at San Francisco.

Marshal's Return.

In obedience to the above Warrant I have the body of Yung Lung Soo *alias* Chin Tock Sing, before Hon. Francis Krull, U. S. Commissioner, at San Francisco, this 20th day of January, 1913. Defendant arrested at San Francisco, Cal., Jan. 20, 1913.

C. T. ELLIOTT,
U. S. Marshal.

[Endorsed]: Filed January 20th, 1913. Francis Krull, United States Commissioner, Northn. Dist. of California. [4]

Amended Complaint Before Commissioner.

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

Before me, Francis Krull, a United States Com-

missioner for the Northern District of California at San Francisco, personally appeared this day Chas. D. Mayer, who being first duly sworn, deposes and says, that he is an officer of the United States, to wit, Immigrant Inspector; that one Yeung Lung Soo *alias* Gin Dock Sue, is a Chinese person who arrived at the port of San Francisco from China on the SS. "Korea" July 14, 1908, ticket No. 51, applying for admission to the United States as a returning domiciled merchant; that said Yeung Lung Soo *alias* Gin Dock Sue was denied admission into the United States on August 26, 1908, by the Commissioner of Immigration at the port of San Francisco, whose adverse decision was affirmed on appeal on October 1, 1908, by the Secretary of Commerce and Labor; that on November 4, 1908, an application was made by the attorneys of said Yeung Lung Soo *alias* Gin Dock Sue, to said Commissioner of Immigration for a rehearing of this case, which application was denied by said Commissioner of Immigration on December 8, 1908, which left said Yeung Lung Soo, *alias* Gin Dock Sue, subject to deportation to China under the law, by the said Commissioner of Immigration; that on November 28, 1908, said Yeung Lung Soo, *alias* Gin Dock Sue, escaped from the custody of said Commissioner of Immigration and has never since his said arrival at the port of San Francisco from China on July 14, 1908, been adjudicated admissible into the United States by any Immigration official, by the Secretary of Commerce and Labor or by the Secretary of Labor; that said Yeung Lung Soo *alias* Gin Dock Sue, is within the United States in violation of the Chinese Exclusion Acts,

particular reference being [5] had to the Act of May 6, 1882, as amended by the Act of July 3, 1884, to the Act of Sept. 13, 1888, and to the Act of April 29, 1902, as amended and re-enacted by the Act of April 27, 1904.

WHEREFORE, deponent prays that a warrant for the arrest of the said Yeung Lung Soo, *alias* Gin Dock Sue, be issued, and that he be arrested and brought before the said U. S. Commissioner and upon a hearing being had, that he be duly adjudged to be illegally in the United States, and that the proper order for the deportation of the said Yeung Lung Soo, *alias* Gin Dock Sue, be made and entered.

Subscribed and sworn to before me, this 18th day of March, 1914.

CHAS. D. MAYER.

FRANCIS KRULL,

United States Commissioner as aforesaid.

I hereby designate Francis Krull, United States Commissioner for the Northern District of California, at San Francisco, before whom Yeung Lung Soo, *alias* Gin Dock Sue, the Chinese person named in the foregoing complaint shall be taken for hearing.

WALTER E. HETTMAN,

Asst. United States Attorney. [6]

Opinion U. S. Commissioner.

UNITED STATES,

vs.

CHIN DOCK.

#315.

From the facts in this case it appears that the defendant Chin Dock, *alias*, etc., is a Chinese person

‘and that he came to this port on board the steamship “Korea,” July 14, 1908, and after due examination by the proper officers was denied a landing, thereupon and pending the return of said defendant to the port whence he came, said defendant escaped from detention.

It further appears from the evidence that said defendant is a merchant and has been such for the two years last past, and is also an officer in a local Chinese benevolent society, whose officers appear to be entitled to certain privileges as such in passing to and from the United States.

It is contended by the Government that the defendant is illegally in the United States and subject to deportation under the Chinese exclusion laws.

I am of opinion that a Chinese person must submit to the exclusion laws when coming into the United States, and if he evades the law and his entry is illegal, he is subject to deportation. It is the province of the Department having the determination of the entry to first pass upon his right to come to the United States. Although he may have gained a status subsequent to his illegal entry that would entitle him to be and remain here, this cannot cure the illegal entry and his violation of the exclusion laws, subject him to the penalty of deportation. As was said in the case of *Ex parte Li Dick*, 174 Fed. 674: “Legally he is here in violation of law, and, so far as he is concerned or can be heard to say, he is found unlawfully here. He has no right to be here as he did not comply with the statutes and rules governing the entry of domiciled Chinese merchants, and

until he has done that at the proper time and place his right to be here as such merchant is suspended. He [7] cannot now be allowed to plead or assert that right as a bar to deportation, even if he might assert it at the proper time and place and in a proper manner. * * * He did not have the right to come and go freely, and his case is not like that of a citizen of the United States arrested for having come in illegally on the supposition he was an alien.”

I do not think the defendant is an official of the Government of China within the meaning of the statutes so as to entitle him to absolute exemption from the provisions of the exclusion laws.

I am also of opinion that section 20 of the General Immigration Laws and Regulations, which fixes a limit of time for deportation, does not apply in this case.

FRANCIS KRULL,
United States Commissioner, Northern District of
California, at San Francisco. [8]

Before FRANCIS KRULL, United States Commissioner for the Northern District of California, at San Francisco.

#315.

THE UNITED STATES OF AMERICA

vs.

GIN TUCK, *alias* YEUNG LUNG SOO, and GIN
DOCK SUE.

**Findings, Judgment and Order of Deportation, U. S.
Commissioner.**

A Complaint verified by the oath of William H. Chadney and Charles D. Mayer, Immigrant Inspectors, having been filed before me, the undersigned United States Commissioner, charging the above named Gin Tuck, *alias*, etc., with a violation of the Act of Congress of the United States entitled "An Act to Prohibit the coming of Chinese persons into the United States," approved May 5th, 1892, and of the Act amendatory thereof approved November 3d, 1893, and the Act of Congress, approved April 29th, 1902, and a warrant for the arrest of the said defendant, having been issued by me thereon and the said defendant having been duly apprehended upon the said warrant by the United States Marshal for the Northern District of California, and brought before me for hearing upon said charge (the United States Attorney for the Northern District of California having duly designated me as the United States Commissioner before whom said defendant should be taken for hearing), now on this 23d day of May, 1914, the said defendant being present in person with George A. McGowan, Esq., his attorney, and W. E. Hettman, Esq., Assistant United States Attorney, appearing for the United States, and this cause having been duly heard and submitted, and due consideration having been thereon had, I do find as follows:
[9]

That defendant Gin Tuck, *alias*, etc., was born in China, and is a subject of the Chinese Empire; that

he arrived at the port of San Francisco from China on the S. S. "Korea" July 14, 1908, that he applied for admission into the United States as a returning domiciled merchant; that he was denied admission into the United States on August 26, 1908, by the Commissioner of Immigration at the port of San Francisco; that said adverse decision was affirmed on appeal on October 1, 1908, by the Secretary of Commerce and Labor; that on November 28, 1908, said defendant escaped from the custody of said Commissioner of Immigration; that on December 8, 1908, an application on behalf of said defendant for a rehearing was denied; that said defendant has not since his arrival at the port of San Francisco from China on July 14, 1908, been regularly admitted into the United States by any Immigration official, by the Secretary of Commerce and Labor or by the Secretary of Labor;

As a conclusion from the foregoing, I find that the defendant Gin Tuck *alias*, etc., is not entitled to remain in the United States by reason of a mercantile status, and that he is not lawfully entitled to be and remain therein.

It is Therefore, Ordered, Adjudged and Decreed, that the said defendant Gin Tuck, *alias*, etc., be deported from the United States to the Country whence he came, to wit, China, and it is further ordered that said defendant Gin Tuck *alias*, etc., be committed to the custody of the United States Marshal for the Northern District of California, to execute the judgment of deportation herein.

WITNESS my hand at my office in the city and

county of San Francisco, in the District aforesaid, this 23d day of May, 1914.

[Seal] FRANCIS KRULL,
United States Commissioner for the Northern District of California, at San Francisco. [10]

[Endorsed]: Filed May 26, 1914. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [11]

Before Honorable FRANCIS KRULL, United States Commissioner, in and for the Northern District of the State of California.

No. 315.

UNITED STATES OF AMERICA,
Plaintiff,
vs.

YEUNG LUNG SOO, Who Gives His True Name as
GIN DOCK SUE,
Defendant.

Notice of Appeal from the United States Commissioner's Order of Deportation.

To the United States Commissioner Above Named and to JOHN W. PRESTON, U. S. Attorney for the Northern District of California:

You and each of you will please take notice that the defendant above named does hereby appeal from the order of deportation made and entered in the above-entitled matter on the 23d day of May, A. D. 1914, to the District Judge or to the United States District Court, in and for the Northern District of the State of California, and further that the said appeal

will be based upon both questions of law and questions of fact.

It is further requested by the said defendant that the Honorable Commissioner herein certify to the said Judge of the said Court the complaint upon which the defendant was tried, the warrant of arrest, the opinion of the Commissioner and the judgement; the order of deportation made and entered herein and the bond given for the appearance of the defendant.

Dated at San Francisco, California, May 23d, 1914.

GEO. A. MCGOWAN,

Attorney for Defendant.

Service of the within Notice is hereby admitted this 23d day of May, A. D. 1914. San Francisco, California.

WALTER E. HETTMAN,

Asst. United States Attorney.

[Endorsed]: Filed May 23, 1914. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [12]

*In the District Court of the United States, in and for
the Northern District of California.*

Before FRANCIS KRULL, United States
Commissioner.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHIN DOCK SUE,

Defendant.

Proceedings Had March 27, 1914.

**TRANSCRIPT OF TESTIMONY TAKEN
BEFORE COMMISSIONER.**

March 27, 1914.

APPEARANCES:

For the United States: WALTER HETTMAN, Esq.

For the Defendant: GEORGE McGOWAN, Esq.

Testimony of K. Ow Yang, for Defendant.

K. OW YANG, called for the defendant, sworn.

Mr. McGOWAN.—Q. You are the Chinese Consul General for the port and district of San Francisco?

A. Yes.

Q. Do you know the defendant in this matter, Chin Dock Sue? A. I know him.

Q. What is his occupation?

A. He is secretary of the Ning Yung Association, and attached to the Chinese Consulate.

Q. He is a Chinese official? A. Yes.

Q. How long has he been such?

A. I know him since he took it this last November.

The COMMISSIONER.—Q. He is now attached to the consular service, is he? A. Yes. [13]

Cross-examination.

Mr. HETTMAN.—Q. By whom was he appointed as such official?

A. He was selected by the Ning Yung Association.

Q. Was he appointed in any way through the Chinese Government, itself?

A. Well, we have an advisory board of the Chinese consul and all the members of the different associa-

(Testimony of K. Ow Yang.)

tions assist our Chinese Consul in the work.

The COMMISSIONER.—His appointment comes through what, some association here? A. Yes.

Mr. HETTMAN.—Q. What is his official capacity, what is his title?

A. He is secretary of the Ning Yung Association, and he does work for the Chinese Consul at any time we have conferences of any kind.

Q. Did he get any papers or any certificate from the Chinese Government stating that he was a Chinese official?

A. Why, every time a new man is selected to come here, he gets his passport from the Minister in Washington to get in here.

Mr. McGOWAN.—Q. These men are all landed as Chinese officials at this port? A. Yes.

Q. Right from the steamer? A. Yes.

Q. Without any requirements being met as to the immigration law?

A. Yes, they are always taken as officials.

Mr. HETTMAN.—Q. His appointment was since November, 1913, is that it? A. Yes.

Q. In November, 1913? A. This last year.

Q. He never held any such official position prior to that time, to your knowledge? A. No.

Q. Should this man have a certificate of any sort from the Chinese Government showing that he is such an official?

A. All the presidents of such association come from China, but [14] the secretary of such asso-

(Testimony of K. Ow Yang.)

ciation, they usually pick up a man who speaks English for that, one who knows English; a man of that kind is generally selected in this country, because we want a man who knows English. The presidents always come from China.

Q. He has no credentials or anything from the Chinese Government?

A. No; but of course, in case he should come from China, the Chinese Government, the Minister in Washington, would issue him a passport.

Q. Then as I understand it, he is secretary for an association in San Francisco, who may do some work for the Chinese Consul if he sees fit to have any work done? A. Yes.

Mr. McGOWAN.—He is a member of the advisory board of the consul? A. Yes.

Testimony of Gee Sam, for Defendant.

GEE SAM, called for the defendant, sworn.

Mr. McGOWAN.—Q. You are the secretary of the Chinese Six Companies? A. Yes.

Q. Do you know this defendant? A. Yes.

Q. What is his occupation?

A. He is secretary of the Ning Yung Association.

Q. This gentleman seated here, who is he?

A. He is the president of the Ning Yung Association.

Cross-examination.

Mr. HETTMAN.—Q. What is the Ning Yung Association?

A. The Ning Yung Association is one of the associations of the Chinese benevolent associations.

(Testimony of Gee Sam.)

Q. How long has the Ning Yung Association been in existence?

A. Well, I could not give you the date, but I think it is 50 or 60 years. [15]

Mr. McGOWAN.—Q. The Ning Yung Association is composed of all of the Chinese living in this country who came from Ning Yung province in China, is it not? A. Yes.

Mr. HETTMAN.—That is a benevolent association, isn't it? A. Yes.

Q. How long has this man been a member of it?

A. This defendant?

Q. Yes. A. Since November, 1913.

Mr. McGOWAN.—You mean an officer?

Mr. HETTMAN.—Yes, an officer; it don't make any difference.

Testimony of Newton G. Cohn, for Defendant.

NEWTON G. COHN, called for the defendant, sworn.

Mr. McGOWAN.—Q. You know the defendant in this matter? A. Yes.

Q. How long have you known him?

A. I have known him about two years.

Q. What is his present occupation?

A. He is a merchant connected with Chung Lung Jan Company, 827 Grant Avenue.

Q. How long have you known him as a member of that firm? A. About two years.

Q. During that time, has he engaged in the per-

(Testimony of Newton G. Cohn.)

formance of any manual labor of any sort or description?

A. No manual labor. I have known him also as secretary of the Ning Yung Association, of which we are the agents.

Q. Now, do you know that he has been a member of this company, a merchant during that length of time? A. Yes.

Cross-examination.

Mr. HETTMAN.—Q. Did you know the defendant prior to the year 1908? A. No, I did not.

Q. Did you ever know of his having any mercantile status prior to [16] two years ago?

A. No, I could not say that I have.

Q. How long have you known him altogether?

A. About two years.

Q. Can you state of your own knowledge whether he was in San Francisco continuously for the last two years? A. Well, I think he was, off and on.

Q. How often did you see him?

A. I have seen him on an average of about once every week, and sometimes oftener; he is connected with this store, and we are the agents for the building of which they are the tenant, and in going into the store, he pays us the rent for certain rooms in that building.

Q. Have you ever testified for any Chinese people before? A. Yes.

Q. How recently? A. About a month ago.

Q. Over at the immigration station? A. Yes.

(Testimony of Newton G. Cohn.)

Q. Ever been up here before to testify?

A. I don't know—I think on one occasion.

Q. How long ago?

A. Possibly a year or a year and a half ago.

Q. How many cases have you testified in in the last year? A. In this court?

Q. In all courts, in Chinese cases?

A. I could not say, about ten or twelve, possibly.

Mr. McGOWAN.—Q. Mr. Cohn, you are in the real estate business, handling Chinatown properties?

A. Exclusively, since the fire.

Testimony of L. C. Tamm, for Defendant.

L. C. TAMM, called for the defendant, sworn.

Mr. McGOWAN.—Q. What is your occupation, Mr. Tamm? A. Real estate and insurance.

Q. Do you know the defendant Chin Dock Sue?

A. I do.

Q. How long have you known him?

A. For possibly over two years. [17]

Q. What is his occupation?

A. He is a merchant.

Q. What firm is he a member of?

A. Chung Lung Jan Company.

Q. Where is their place of business?

A. Dupont Street.

Q. How long has he been so engaged, to your knowledge?

A. Previous to my being connected with the real estate business, I don't know how long it was, but to my knowledge it was possibly over two years.

(Testimony of L. C. Tamm.)

Q. During that time, has he engaged in the performance of any manual labor?

A. Not that I know of.

Cross-examination.

Mr. HETTMAN.—Q. Did you ever know this man in the year 1908, or prior thereto?

A. No. I became connected with the real estate business 21½ years ago.

Q. You never knew him at all prior to 1908?

A. No.

Q. You have only known him within the last two years? A. Or over.

Q. How often did you see him at his place of business within the last two years?

A. I attended to collecting in the Chinatown district, and also fire insurance, and I have seen him several times on fire insurance, and finally had the premium from him.

Q. What business were you dealing in with him?

A. It was insurance.

Q. He paid you; he paid the money to you?

A. Well, he hasn't exactly paid yet, because the insurance was not carried long enough to be paid.

Q. He made the contract?

A. He did; he submitted it to his manager, Soo Hoo Fong.

Q. How often have you seen him in that store within the last two years; how many times altogether? A. Many times.

Q. How many?

(Testimony of L. C. Tamm.)

A. Well, I suppose I would drop in once a week or sometimes two or three times a month; I am right there in [18] Chinatown.

Q. When was the last time you saw him in that store?

A. A few days ago, possibly a week or so.

Q. What was the last time before that?

A. Well, it might have been a week before that. I am passing every day through Chinatown; we have collecting in that block.

Testimony of Wong Lung Moon, for Defendant.

WONG LUNG MOON, called for the defendant, sworn.

Mr. McGOWAN.—Q. What is your occupation?

A. Dupont Street.

Q. What is your business? A. Merchant.

Q. What is the name of your firm?

A. Chung Lung Jan Company.

Q. Where is its place of business?

A. Grant Avenue.

Q. What number? A. 827.

Q. What is your position in that store?

A. Manager of the store.

Q. Do you know the defendant, Chin Dock Sue?

A. Yes.

Q. What is his occupation?

A. He is a member of the firm.

Q. Does his name appear on your partnership list as a partner? A. Yes.

Q. You have the list there? A. Yes.

Testimony of K. Ow Yang, for Defendant (Recalled).

K. OW YANG, recalled for defendant.

Mr. McGOWAN.—Q. I show you a certificate and ask you what that is?

A. This is a passport given by the minister to one of the presidents of the Ning Yung Association to come here from China.

Q. That is issued by the Chinese Minister at Washington? A. At Washington, yes.

The COMMISSIONER.—That does not relate to this man.

Mr. McGOWAN.—That is Lee Yung Bing?

A. Yes.

The COMMISSIONER.—Has he been a witness here?

Mr. McGOWAN.—No. [19]

Q. He is at the present time the President of the Ning Yung Association? A. Yes.

Q. Now, then, if this defendant were coming from China to be landed here as secretary of the Ning Yung Company, he would have a certificate issued to him just like that? A. Yes.

Q. Describing him as the secretary, instead of the president? A. Yes.

Q. Where the president of one of these companies is appointed here, does not come from China, does he have one of these issued to him? A. No.

Mr. HETTMAN.—Q. Did the Minister of China appoint the defendant here, as secretary of this association? A. No.

(Testimony of K. Ow Yang.)

Q. All this refers to is some other man whose passport you have here, signed by the minister of China, for a man by the name of Lee Yung Bing?

A. Yes.

Q. Has nothing to do with this defendant, here?

A. No.

Mr. McGOWAN.—Q. How are the presidents of this company selected?

A. They are selected by—

Mr. HETTMAN.—We object to this.

The COMMISSIONER.—It is not very relevant, but I want to hear all that bears upon the question.

Q. How are the presidents selected?

A. They are selected by the people of the association.

Q. And then the Chinese minister simply confirms the person that has been selected?

A. Yes, sanctions his selection. [20]

Testimony of Charles B. Mayer, for the Government.

CHARLES B. MAYER, called for the United States, sworn.

Mr. HETTMAN.—Q. Mr. Mayer, I want to show you a paper marked for identification and ask you if you can identify the signature there on this document. A. I can.

Q. I ask you to read the foregoing statement here to that signature.

The COMMISSIONER.—What is it, a certificate?

Mr. HETTMAN.—A certificate. I would like to have that read in evidence. It reads, “I Samuel W.

(Testimony of Charles B. Mayer.)

Backus, the duly appointed, qualified and acting Commissioner of Immigration and officer of the United States in charge of the enforcement of the laws pertaining to the admission of Chinese at the port of San Francisco, State of California, and the custodian of the records concerning the admission and applications for admission of all classes of Chinese persons and persons of Chinese descent made at said port, hereby certify that attached hereto is a complete record covering the arrival at this port on July 14, 1908, of Yung Lung Soo who applied for admission as a returning domiciled merchant holding ticket No. 51, and whose application for admission as such merchant was denied on August 26, 1908, and who escaped from detention on November 28th, 1908, the same being a part of the official records in my custody.

“In witness whereof I have hereunto subscribed my name and affixed the seal of my office this 26th day of March, 1914. Samuel W. Backus, Commissioner of Immigration.”

Q. That is his signature and seal? A. Yes.

Q. The seal of his department? A. Yes.

Q. That record was given into your custody to bring here to-day, was it? [21] A. Yes, sir.

Q. I will ask you if to your knowledge that is a record certified by Samuel W. Backus? A. Yes.

Mr. HETTMAN.—I would like to offer that record in evidence at this time.

Mr. McGOWAN.—That is objected to upon the ground that the record is incompetent for said pur-

(Testimony of Charles B. Mayer.)

poses, that is to show that this man arrived, to show what the ultimate disposition of his case was; as to those matters we have no dispute; we are not contesting them; but the admissibility of all this testimony in there is seriously questioned; it has no place properly before your Honor. Your Honor cannot repair the issue before the Commissioner. Things contained in that record are not evidence and have no place before the Court. The only thing which the Government is entitled to show is that this defendant arrived at that time, that he was denied admission and that he escaped.

Mr. HETTMAN.—Are those facts admitted?

Mr. McGOWAN.—Those facts the defendant is willing to admit.

Mr. HETTMAN.—This record is submitted simply for what it is worth, and if the Court sees fit not to regard the record the Court can do so.

The COMMISSIONER.—Does the record show he was refused landing, or had his case been passed upon?

Mr. MAYER.—It has been passed upon.

The COMMISSIONER.—Had he been refused landing?

A. Yes, he had been refused landing and pending his return to China he escaped.

The COMMISSIONER.—If that fact is admitted, that is all you have got to present here, because I cannot review the record of the conclusions that the Department came to. The [22] fact that he came

(Testimony of Charles B. Mayer.)

here and that he was refused landing and that pending his return to China under that refusal to land him he escaped are the only facts really that can be proved before me, and if those facts are sufficient under the law to show that he is here and not entitled to be and remain here, then my judgment would have to be accordingly.

Mr. HETTMAN.—We simply submit this record to corroborate the statement of the witness.

The COMMISSIONER.—I will only consider the ultimate facts as admitted here. I am not going into this Chinese record here.

Mr. McGOWAN.—Q. Is it a fact that an application for rehearing was made in this case and was pending and being investigated at the time, but not denied by the Commissioner at the time this man escaped? A. It was not denied at the time.

Q. It was subsequently denied?

A. It was subsequently denied, but the application for a rehearing was not denied before the man escaped.

Q. It was denied afterwards? A. Yes.

Testimony of Chin Dock Sue, for Defendant.

CHIN DOCK SUE, called for the defendant, sworn.

Mr. McGOWAN.—Q. When did you first enter the United States? A. Kwong Sue 7 (1881).

Q. Did you procure a certificate of residence under the terms of the Chinese Immigration Act?

A. Yes.

(Testimony of Chin Dock Sue.)

Q. Have you that certificate?

A. Yes, I have it.

Q. Have you got it with you?

A. No, I have not got it now.

Q. Are you married? A. Yes.

Q. Have you a wife living in this country?

A. Yes.

Q. What was her name? A. Chin See. [23]

Q. Where did she reside? A. Los Angeles.

Mr. McGOWAN.—I will bring the certificate afterwards and present it to the Court.

Testimony of W. T. Boyce, for the Government.

W. T. BOYCE, called for the United States, sworn.

Mr. HETTMAN.—Q. Mr. Boyce, you are connected with the Immigration Bureau of San Francisco? A. Yes.

Q. In what capacity?

A. I am in charge of the detention and deportation.

Q. Have been for how many years?

A. Well, the detention division probably for 15 years.

Q. You were in that position in 1908? A. Yes.

Q. You have charge of aliens who are about to be deported or who are held in detention? A. Yes.

Q. Do you keep a careful memorandum of those who escape?

A. I did at that time, until the system had been changed.

Q. At that time did you note the escapes in the

(Testimony of W. T. Boyce.)

year 1908? A. Yes.

Q. Can you refer to the date—

The COMMISSIONER.—Mr. Hettman, it has been admitted that he escaped. What do you want to prove in relation to that?

Mr. HETTMAN.—I want to show by certain evidence that he has in regard to that.

Q. I ask you to refer to your memorandum in November, 1908, and ask if you have any Chinese there escaping on that day?

Mr. McGOWAN.—That is objected to as immaterial, irrelevant and incompetent. It is admitted that this defendant was an applicant for admission and that he escaped. That is an admitted fact in the case. [24]

The COMMISSIONER.—He can answer that question.

Mr. HETTMAN.—Q. What name have you there as escaping on that day?

A. I have quite a number of them.

The COMMISSIONER.—Q. Have you the name of this man as having escaped on that day?

A. What name?

Q. Chin Dock Sue?

A. I have a man, Yung Lung Soo, designated as ticket No. 51 on the steamer "Korea" of July 14, 1908.

Mr. HETTMAN.—Q. You have had occasion to pass upon photographs every day in your work, have you not? A. Yes.

Q. I will show you a photograph here in this rec-

(Testimony of W. T. Boyce.)

ord, and ask you if that is the photograph of this man here? It is on page 67 of this record.

A. I will pass on it as being this man.

The COMMISSIONER.—You would say it was the same man, would you? A. Yes. [25]

April 2d, 1914.

Testimony of Chin Dock Soo, for Defendant.

CHIN DOCK SOO, the defendant.

Mr. McGOWAN.—Q. You testified when you were last under examination that you had a certificate of registration? A. Yes.

Q. Have you that certificate with you? A. Yes.

Q. Produce it? A. There it is.

Mr. McGOWAN.—The defendant produces certificate of residence No. 141,274, issued to Gin Soo, person other than a laborer, Los Angeles, California, local residence, No. 38 Marchesault Street, Los Angeles, California, occupation, pawn broker, to which is annexed a photograph of the person to whom the certificate is issued. This is a duplicate certificate issued by John C. Lynch, Collector of Internal Revenue, on the 23d of January, 1900, issued in lieu of the original certificates Nos. 82,541 and 138,680, lost; proof of said loss now on file in this office, signed "John C. Lynch, Collector."

Q. Is the photograph annexed to that certificate a likeness of yours? A. Yes.

Mr. HETTMAN.—This is a duplicate issued to him?

Mr. McGOWAN.—In lieu of the one that was lost, in 1900.

(Testimony of Chin Dock Soo.)

Mr. HETTMAN.—Q. When did you get your first certificate of residence?

A. The first one, Los Angeles.

Q. I mean what date?

A. I have forgotten the date. In the Custom House they lost my certificate and they made this new one for me.

The COMMISSIONER.—You think this is the same man?

Mr. McGOWAN.—Oh yes, Gin Soo. It is sometimes spelled Chin. [26]

The COMMISSIONER.—Why didn't he produce this certificate on his attempt to re-enter here?

Mr. McGOWAN.—He did not want to do it.

Q. Did you, after the issuance of this certificate make application to go to China as a Chinese laborer?

A. Yes.

Q. I show you this paper and ask you if that is a copy of that application? A. Yes, sir.

Q. That is your photograph attached thereto?

A. Yes.

Mr. McGOWAN.—This is an application for the issuance of a laborer's return certificate by Gin Soo, filed on January 21, 1903, by William A. Waters, Deputy Collector.

Q. Who is Mr. Waters? Is that the Deputy Collector of Customs at Los Angeles—at that time?

A. Yes.

Q. Did you go to China as a laborer on that certificate? A. They would not let me go.

Q. Who would not let you go?

(Testimony of Chin Dock Soo.)

A. The Chinese Inspector, Mr. Putnam. He O. K.'d the paper, and when I came to San Francisco he refused me to go; he said my occupation was a pawn broker; at San Francisco they refused to let me go because my certificate of residence was as a pawn broker.

Q. In other words, they at that time held that a pawn broker was a merchant and not a laborer?

A. Yes.

Q. Then you afterwards returned to Los Angeles?

A. Yes.

Q. And then made application to go to China as a merchant? A. Yes.

Q. How long were you gone out of the United States on that trip to China? A. About a year.

Q. From the time you left Honolulu until your return to Honolulu, was that less than a year?

A. Yes.

The COMMISSIONER.—The defendant was denied the right to go on this certificate here. [27]

Mr. McGOWAN.—Because they held it was a merchant and not a laborer. Then he departed as a merchant without prior investigation and upon his return after an absence of I think it is six days less than a year from the United States, that is, deducting the time that it takes to go from San Francisco to Honolulu. Then his application to land was denied and he appealed and the appeal was dismissed. A rehearing was asked for, and while it was under consideration he escaped. After that the Commissioner of Immigration denied the application for rehearing. [28]

[Endorsed]: No. 5493. U. S. vs. Chin Dock Sue, Deft. Exhibit No. "A." Filed May 13, 1915. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk.
[29]

*In the District Court of the United States in and for
the Northern District of California, First Division.*

Before Hon. MAURICE T. DOOLING, Judge.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

CHIN DOCK SUE,

Defendant.

Proceedings Had May 13, 1915.

TRANSCRIPT OF TESTIMONY TAKEN IN
OPEN COURT.

Thursday, May 13, 1915.

Counsel Appearing:

For the United States: WALTER HETTMAN, Esq.

For the Defendant: GEORGE MCGOWAN, Esq.

Mr. HETTMAN.—I think there is only one point of law involved here, and that is the question of whether or not an alien coming in illegally can gain a mercantile status. If the defendant's attorney stipulates as to the facts, I would be willing to write a brief as to the point of law. Probably it would do away with a great deal of argument and unnecessary proceedings before your Honor.

Mr. MCGOWAN.—The facts, if your Honor

please, are quite fully developed in the testimony taken before the Commissioner, and the testimony has been transcribed; I understand it is the purpose of the Government to stipulate with respect to the facts as set forth in the transcript; that is perfectly satisfactory to the defendant. I would ask to file this transcript. I also desire to introduce into evidence the certificate of residence of the defendant Gin Soo, [30] No, 141,274.

Mr. HETTMAN.—Mr. McGowan, that is already in evidence, is it not? If all the papers come up these are exhibits, are they not? We have simply to stipulate that the entire record may come up in its original form.

Mr. McGOWAN.—There is a question with respect to that, and that is a ruling of the Commissioner on the admissibility of the immigration record, which you have presented. The defendant had no objection to the admission of the ultimate facts shown from this record, that is, that the defendant did go to China at a certain time, that he did return at a certain time, that his application to land was denied, that an appeal was taken from that adverse decision, that the appeal was dismissed, that a rehearing was asked for, was entertained, and during the consideration of it there was an escape from the Mail Dock detention shed at which 19 different Chinese escaped, this defendant being one of them, and after the escape the rehearing was denied by the Commissioner. There is no objection to those ultimate facts appearing in the record, but we object to the introduction of the record itself in evidence, con-

taining a lot of prejudicial matter from enemies of this man in Los Angeles. We object to these facts appearing in the record, because if the Government desires to put that kind of evidence in this record, they should have those witnesses here. When that matter was presented to the Commissioner, his ruling upon it was to this effect:

“If that fact is admitted, that is all you have got to present here, because I cannot review the record or the conclusions that the department came to. The fact that he came here and that he was refused landing, and that pending his return to China under that refusal to land him he escaped, are the only facts really that can be proved before me, and if those facts are sufficient under the law to show that he is here and not entitled to be and remain here, [31] then my judgment would have to be accordingly.” As to the existence of those ultimate facts, we do not dispute them.

The certificate of residence I have presented. I also desire to present the application for a laborer's return certificate on behalf of this defendant, Gin Soo, which is mentioned in the transcript also. I ask that that be marked an exhibit.

I also desire to introduce in evidence, or rather, to read in evidence for the purpose of the record, the latter part of Decision No. 10 of the Department of Commerce and Labor, issued on January 23, 1914—that part of the decision which is upon page 3 and which covers a point raised upon behalf of the defendant in this matter:

“It seems proper in this connection to direct at-

tention also to the last paragraph of page 2 of your letter of the 6th instant, transmitting the case of Chu Kin to the department, which paragraph reads as follows:

‘It may be stated, as a matter of regret, however, that he (appellant) failed to have his case investigated prior to departure, since such an investigation must have disclosed not only the fact that he was not a merchant, but that he possessed “property” in the islands of more than sufficient value to entitle him to a “laborer’s return permit.”’

“ ‘Upon this subject your attention is directed to the opinion of the Solicitor of the Treasury (T. D. No. 23,525) of February 17, 1902, in which he held that a Chinaman registered as “a person other than a laborer”—as Chu Kin was—and who after such registration becomes a laborer, is not entitled to the issuance of a laborer’s return certificate.

‘Respectfully,

‘GEO. B. CORTELYOU,

‘Secretary.

‘JOSHUA K. BROWN, [32]

‘Chinese Inspector in Charge, Honolulu T. H.’ ”

There is one other certificate mentioned in the testimony which I will have to procure. I do not know that I can obtain it for the purpose of filing, but I will bring it and have it read so that the stenographer can take it down—that is, the certificate of the Chinese official that was presented before the Commissioner, for the purpose of getting it before the Court.

Mr. HETTMAN.—This certificate that you refer

to, Mr. McGowan, it developed before the Commissioner that this defendant claimed to be an officer of a certain Benevolent Society, and that this gave him an exempt status because some Chinese Consul here in San Francisco had appointed him. We have shown, however, that he was simply the secretary of this Benevolent Society, and that did not give him any exempt status, and it was subsequent to the order of deportation. He was simply in this capacity of secretary of whatever it was; now, that is in the record, that is admitted, and we do not see any necessity for the filing of any such certificate, and I do not remember that any particular certificate on behalf of the secretary, is here in evidence, or was produced at the time of the hearing before the Commissioner.

Mr. McGOWAN.—The purpose of it, if the Court please, is this: The Chinese Exclusion Laws contain the provision that those exclusion laws shall not apply to Chinese officials, diplomatic officials and consular officials, and their attaches, their servants, or those connected with them; and whatever their capacity is, the language of the statute is sufficiently broad that it gives them a complete exemption from the law. This defendant was charged with being in the United States without a certificate of registration. He has the certificate of registration, and it was presented. The Government then filed, I believe, one subsequent complaint making two [33] complaints against the defendant; the last complaint against the defendant charges that he is a Chinese laborer, that he has no right to be and remain in the

United States. This defendant was an official of the Chinese Government at the time this last complaint was sworn to; he was not such an official at the time the first complaint was sworn to. The nature of his official position is this: The Chinese Government maintains in San Francisco what is known in English as the Chinese Six Companies. These Six Companies correspond to the six provinces in China, that the different Chinese in this country originally migrated from, that is, those who originally came here. These Six Companies correspond to the geographical divisions. To settle their affairs in this country, they have these Six Companies, which sit as a sort of a court of voluntary arbitration, in one sense, to settle all of the affairs, in which the Chinese are interested on one side or the other; that is, it is not compulsory. If the Chinese want to resort to our American courts or institutions, they have that right, of course, but they have felt a great confidence in their being able to settle their own affairs among themselves, and they take their affairs up in the Chinese Six Companies and settle them there, having the pros and cons of the different matters presented. The system there is that when a complaint is presented, it is referred to the officials who come from that part of China that these people come from; they come from the Ning Ying district, which is the most populous one there, and of which this defendant was the secretary; the matter in dispute is referred to the company and they report back to the parent body, and the parent body imposes its determination upon

them. The officers of this company are known as Chinese officials; the presidents come from China. They are admitted upon official papers, and usually a letter from the Chinese minister, stating that this man is president of a certain company, and an attache of the Chinese [34] Consul at San Francisco; they are admitted through the immigration channels here upon that. The secretaries of these companies are usually appointed in San Francisco because they endeavor to get some one who speaks the English language, so that they can come more in contact with the white people. These positions, both of president and secretary, are elective, that is, the Chinese people belonging to that particular district elect their president and their secretary, and that is confirmed by the Chinese Government in this way, that if the person elected as the president or the secretary is in China and is coming to this country, the Chinese Minister will give him a letter stating that he has been appointed. Upon the other hand, the president or the secretary elected resides here and his position is recognized by the Government by receiving him in that capacity and treating and dealing with him in that way. That is the way that is done. This particular defendant elected here was rated and received as such official by the Chinese Consul General, who appeared and testified for him. The president of his company came from China, and we had his letter from the minister here, presented it before the Commissioner solely for the purpose of enlightening the Court as to just what that letter or recognition of appointment would

show. That was the only purpose of it. It only has an indirect bearing upon the defendant, because he, living in this country at the time of his election and recognition, there would be no necessity for such a letter being sent to him. It was simply for the purpose of showing then what that letter from the minister would show that it was presented to the Commissioner, for such light as it would throw upon the inquiry. I can get that certificate, and I would like to present it, or have it read into the record; so, in determining the matter, your Honor can see just what this certificate sets forth. I really do not see what objection the Government could have to that. I have made the statement [35] with respect to the reasons why I desire to present this certificate, so the Court may see just what it sets forth.

Mr. HETTMAN.—I would like to make a reply to your statement. We can stipulate as to those things. The facts of this case, if your Honor please, are that this Chin Dock Sue came to the United States in 1908 and applied for admission, and at that time he was refused admission on the ground that he was a laborer, and was ordered deported. This case was appealed to the Secretary of Commerce and Labor, and the Secretary sustained the Immigration Department, and while the defendant was in one of the detention sheds at the ferry, he escaped. Subsequent to this case, he acquired a mercantile status, and he was arrested then in 1913—in the year 1913, he was charged in this court with Tom Jung Ching for a conspiracy to smuggle Chinese into the country, and at that time his identity was discovered; it was learned

that he was the same Chin Doek Sue who had escaped from this shed. The Immigration authorities then took him into custody and said under this old order of deportation he was still subject to be deported, he had escaped, and the mere fact he had been at large since 1908 was immaterial. Mr. McGowan then appeared and asked for an appeal over there at the Immigration station, and they refused to allow the appeal on the ground that he was an applicant for admission. Then Mr. McGowan sued out a writ of *habeas corpus*; that was on January 27, 1914, and your Honor ruled that he had been in the country at large for five years, and should be entitled to a hearing before the United States Commissioner; and so he was duly arrested in January, 1914, upon a warrant signed by an immigration inspector, and this complaint before Commissioner Krull was finally amended. The matter came on for hearing and at several hearings briefs were filed. Mr. McGowan filed an opening brief; we filed our brief, and he [36] filed a reply, and the Commissioner filed his opinion, and also his decree, ordering this alien deported, and the matter then came on appeal to this Court.

Now, all these matters, all these papers, filed before the Commissioner are in evidence before your Honor here. The entire record has been set up, including the decisions and the briefs, and the Government is willing to simply submit the matter upon these records and briefs and everything as it appeared before the Commissioner. Mr. McGowan wishes in addition to file a certificate from certain Chinese officials showing that this alien has acquired an exempt status, and

that he is an official in a Chinese benevolent society, and duly appointed by the Chinese consul. Now, as to just what this certificate would show, or as to how relevant it would be, I cannot say, but it appears to me that this man, being simply a secretary and was appointed subsequent to his order of deportation, that this is simply a point of law as to whether or not he can acquire an exempt status while he was under an order of deportation; while an alien woman who is ordered deported, and pending her deportation she married an American citizen that can defeat the order of deportation. This is a matter of record, that this man is secretary of a benevolent society, but he was not appointed by officers in China. He did not come from China with credentials as an official duly appointed should come, but was simply made a secretary of the Chinese Benevolent Society subsequent to his order of deportation; and these certificates that might be filed now I do not think would be relevant, but if it is a matter of enlightenment to the Court I do not suppose there would be any harm in filing them. In addition to the cases cited in our brief, which is in the record here, I wish to call your Honor's [37] attention to the case of *Ex parte Chin Fong*, 213 Fed., at page 288, which was decided by your Honor April 17, 1914. That was a case in which an alien subsequent to his surreptitious entry into this country acquired a mercantile status. The matter was fully decided by your Honor that such an alien could not acquire a mercantile status that would prevent his deportation. We are

willing that the matter be submitted as the record stands.

Mr. McGOWAN.—The point involved is a little more extensive, it seems to me. This defendant entered the United States a matter of thirty-four years ago. He entered lawfully and in compliance with all the laws of this country. He secured a certificate of registration. He describes himself as a Chinese person other than a laborer, giving his occupation as a pawn-broker. This defendant wanted to go to China; he was a man of property; he had a number of vegetable garden interests in and about Los Angeles that were worth upwards of \$1,000; he had money invested in pawn shops; he had money in drug-stores, and altogether his holdings amounted to almost \$10,000. He wanted to go to China. He made application to depart as a laborer. There has been a great deal of confusion in the rulings of the Department. They have held, at one time, that they could go and come as merchants. Then they changed and held that a restaurant-keeper is not a merchant, and that a pawn-broker is not a merchant, because they are not engaged in buying and selling merchandise, and that they should not be classed as merchants. This defendant made application to depart as a laborer because a pawn-broker was not classed as a merchant. He filed an application to depart in which it was set forth that he had a wife living in this country, which is one ground, and also set forth that he had property interests in this country, which is another ground to give a laborer the right to go and come. He presented his laborer's [38] departure certificate to

the Deputy Collector of Customs. He examined it and approved his application to depart. When he came to San Francisco and sought to depart he was confronted with the situation where the Department had ruled that a Chinese person registered other than a laborer, as he was, could not depart as a laborer. That ruling has subsequently been changed, and now a person who is registered, irrespective of what his registration certificate shows as to his status at that time, may depart as a laborer upon meeting the qualifications which the law requires. So this man seeking to comply with that law was denied his application upon the ground that he should have been registered as a person other than a laborer, and so his application to depart as a laborer was denied. He returned to Los Angeles and subsequently attempted to go to China as a merchant. He departed and came back. His absence from the United States, counting the time the ship left Honolulu was a little short of one year, which is within the time that a laborer may come and go. He returned to San Francisco. His case was heard and a vast amount of evidence was produced against him under circumstances which, he has always alleged, constitute conspiracy to keep him out of the country. The proper authorities heard his case and denied it. An appeal was taken to the Department and the appeal was dismissed. I appeared as attorney for the man in that proceeding, although of course I did not know him. During the pendency of that matter representations were made to me that he had been victimized, that a conspiracy existed to keep him out of the country by someone who had run

away with his wife during his absence in China and by persons who owed him money. A petition for rehearing was filed which was in process of examination and determination. [39] This man during all these months was in detention. One night seven or eight or nine Chinese walked out, and he stayed there and watched them go. His detention lasted quite a long period after that, and he feeling that he could not get justice, another night came along and some seventeen Chinese went out, and the next morning he was not present at roll-call. That was in 1908. This defendant bought a business at sheriff's sale in San Luis Obispo, and went there and remained there as a merchant for two and one-half years engaging in business immediately after his escape. He was there in perfect security until one day the immigration authorities got word of the fact through some sort of anonymous letters and he had to leave in a hurry. He came to San Francisco and became a merchant here, and he was in business for a matter of three and one-half years. Now, an inspection of this man—a personal inspection as well as an inspection of the evidence—will show that this man does not belong to the laboring class; I don't suppose he has labored in probably twenty or thirty years. He was elected as a Chinese official and it is contended that this official status exempts him from this deportation proceeding.

(Thereupon counsel discussed the Immigration Acts.) [40]

(Copy of Certificate:)

“LEGATION OF CHINA,
WASHINGTON.

No. 216.

To all to whom these presents shall come, Greeting:

Whereas Mr. Lee Yew Bong is about to proceed from his home in China to the port of San Francisco, California, accompanied by his body servant, Lee Chock Yuen, for the purpose of filling the office of President of the Ning Yang Association, one of the Chinese Benevolent Associations, and Ex-Officio member of the Advisory Board of the Chinese Consulate General at the said port.

These are, therefore, to request all Customs and Immigration Officers whom it may concern, to permit the said Lee Yew Bong with his body-servant to pass freely and safely without let or hinderance, and, in case of need, to give him all friendly aid and protection.

Given under my hand and the seal of the Legation at the City of Washington, June 20, 1913.

[Seal]

CHANG YIN TANG,
The Minister of China.

All father

13486/6-5

S. F. 6-22-14

13794

and 10-14 ”

(Attorney's Note:) The sets of figures at the bottom of this certificate indicate from information

given to me by Charles B. Mayer, an Immigration [41] Inspector, that the holder of this certificate has had two sons landed in the United States; the first Lee Fook Lin arrived on the Steamer "Manchuria" September 17, 1914, and was landed as an official son October 1, 1914; the second, Lee Toy Lin, arrived on the steamer "Siberia" June 13, 1914, and was landed as an official son June 26, 1914; that the criminal prosecution which was instituted against this defendant, and which was mentioned by Mr. Hettman in his presentation of the matter to the Court, was subsequently dismissed upon the motion of the defendant's counsel.

[Endorsed]: Presented in Open Court and Filed by Order Thereof *Nunc Pro Tunc* as of May 15, 1915. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [42]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 5,493.

UNITED STATES OF AMERICA,

vs.

GIN DOCK SUE.

Opinion and Order Affirming Order of Deportation.

JOHN W. PRESTON, Esq., United States Attorney, and CASPAR A. ORNBAUM, Esq., Assistant United States Attorney, Attorneys for the United States.

GEORGE A. MCGOWAN, Esq., Attorney for Gin Dock Sue.

In July, 1908, Gin Dock Sue applied for admission at the port of San Francisco as a returning Chinese merchant. On August 26th, 1908, his application to land was denied, and on appeal the order denying his application was affirmed. He then applied for a rehearing, but on November 26th, 1908, and before such application was heard, he escaped from the detention quarters and has ever since been within the United States. On December 8th, 1908, his application for a rehearing was denied by the following order:

“San Francisco, Dec. 8, 1908.

“This man escaped from Pacific Mail Steamship dock and is a fugitive. Application for rehearing denied.”

Having been later found in this country he was arrested and after a hearing before the Commissioner was ordered deported. From the order of deportation an appeal was taken to this Court. It is urged here, as it was urged before the Commissioner, that respondent is a merchant, and [43] that he is an attachee of the Chinese Consular office in San Francisco. But whatever status he may have as an attache of the Consulate has been acquired since his

escape from the immigration officers in 1908. I do not think that this method of entry into the country can be cured by thereafter becoming attached to a consular or other office. As to his mercantile status, if it existed before his escape, that was a matter to be established regularly before the immigration officers at the time that he applied to enter. If their proceedings were unfair in the investigation of that question he might then have appealed to the courts. Instead of doing so he chose to enter the country by escaping from custody. If the status was acquired after such escape, he can no more be heard to urge it here as giving him a right to remain in this country than he can be heard to urge his connection with the Consulate. The law will not put such a premium upon surreptitious entries into the country as to permit one so entering to acquire a right to remain. The order of deportation is therefore affirmed.

October 8th, 1915.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Oct. 8, 1915. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [44]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 5,493.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GIN DOCK SUE,

Defendant.

**Stipulation as to Ultimate Facts Appearing from
Immigration Record.**

It is hereby stipulated and agreed by and between the respective parties in the above-entitled cause that the ultimate facts as shown by the record of the Commissioner of Immigration at the port of San Francisco in said cause are as follows :

That on July 9, 1907, defendant departed from the United States for China ;

That on July 14, 1908, the defendant returned to the United States from China, applying for admission under the name of *Yeung Lung Soo*, at the port of San Francisco, as a returning Chinese merchant of the firm of Dan Saw Hong Company, 306 Marchessault Street, Los Angeles, California ;

That on August 26, 1908, defendant was denied admission into the United States by the Commissioner of Immigration for the port of San Francisco ;

That on October 1, 1908, defendant's appeal from the excluding decision of the said Commissioner of

Immigration was dismissed by the Secretary of Labor;

That on November 4, 1908, defendant's attorneys applied to the said Commissioner of Immigration for a reopening of the case, certain affidavits being filed in support of said application; [45]

That on November 28, 1908, the defendant escaped from the custody of the Pacific Mail Steamship Company, at San Francisco, California, which Company had brought the defendant to the port of San Francisco, California, from China, on July 14, 1908, and which Company had held him in custody awaiting the determination of his application for admission into the United States.

That pursuant to the said application for a reopening of the case made by defendant's attorneys on November 4, 1908, said Commissioner of Immigration referred the matter of said application for reopening to the Immigration officials at Los Angeles, California, for investigation;

That on December 3, 1908, the said Commissioner of Immigration received a report from the said Immigration officials at Los Angeles, California, upon their investigation made pursuant to the said application for reopening;

That on December 8, 1908, the said Commissioner of Immigration made the following entry in the record of the matter of the said application of the defendant for admission into the United States;

“San Francisco, Dec. 8, 1908.

This man escaped from the Pacific Mail Steamship Company, and is a fugitive—application for a rehearing denied.

H. H. NORTH,
Commissioner.”

And it is further stipulated and agreed by and between the respective parties in the above-entitled cause and their attorneys that the facts as herein set out are the ultimate facts as shown by said record of the Commissioner of Immigration, Port of San Francisco, and are to be considered by the United States Circuit Court of Appeals on the appeal taken herein.

JNO. W. PRESTON,
U. S. Attorney.
CASPAR A. ORNBAUN,
Asst. U. S. Attorney.
GEO. A. McGOWAN,
Attorney for Gin Dock Sue.

[Endorsed]: Filed Jan. 18, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [46]

*In the District Court of the United States, in and for
the Northern District of the State of California,
Divison Number One.*

No. 5,493.

UNITED STATES OF AMERICA,

vs.

Plaintiff,

GIN DOCK SUE,

Defendant.

**Stipulation and Order Approving Statement of the
Case and Agreed Statement of Facts with Re-
spect Thereto.**

It is hereby stipulated and agreed by and between the counsel for the respective parties hereto that the transcript of the hearing had on May 13th, 1915, in the above-entitled matter, as the same has been transcribed and filed in the above-entitled matter, together with the exhibits therein filed and introduced in evidence, or copies of the said exhibits, do and shall constitute the agreed statement of facts, or statement of the case in the above-entitled matter, and we hereby agree to the statement and the allowance and approval of the same by the Judge of the above-entitled court. It is further stipulated and agreed that the defendant and appellant in this matter is variously referred to in the papers on file herein as Gin Dock Sue, Gin Soo and Young Lung Soo; the family name of the defendant as spelled in the transcript, "Chin," is a phonetical error, the correct spelling of the defendant's family name being "Gin."

Dated at San Francisco, California, January 18th, 1916.

GEO. A. MCGOWAN,
Attorney for Defendant.

JNO. W. PRESTON,
United States Attorney.

Order.

Upon reading and filing the foregoing stipulation, it is hereby ordered that the statement of the case, or agreed statement of [47] facts as recited in the

foregoing stipulation is hereby settled and allowed and approved.

Dated at San Francisco, California, January 19th, 1916.

M. T. DOOLING,
United States District Judge.

[Endorsed]: Filed Jan. 19, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [48]

*In the District Court of the United States, in and
for the Northern District of the State of Cali-
fornia, Division Number One.*

No. 5493.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GIN DOCK SUE,

Defendant.

Notice of Appeal.

To the Clerk of said Court and to the Honorable
JOHN W. PRESTON, Esquire, United States
Attorney for the Northern District of Cali-
fornia.

You and each of you will please take notice that
the above-named defendant, Gin Dock Sue, defend-
ant and appellant, hereby appeals to the United
States Circuit Court of Appeals for the Ninth Cir-
cuit, from the order confirming the judgment and
order of deportation made and entered herein on the
8th day of October, A. D. 1915.

Dated at San Francisco, Cal., January 18th, A. D.
1916.

GEO. A. McGOWAN,
Attorney for Gin Dock Sue, Defendant and Appel-
lant. [49]

*In the District Court of the United States, in and
for the Northern District of California, Division
Number One.*

No. 5493.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

GIN DOCK SUE,
Defendant.

Petition for Appeal.

Comes now Gin Dock Sue, defendant and appel-
lant herein, and says:

That on the 8th day of October, A. D. 1915, the
above-entitled court made and entered its order con-
firming the judgment and order of deportation
herein, in which said order and the judgment and
order of deportation herein and the proceedings had
prior thereunto in the above-entitled cause certain
errors were committed to the prejudice of this de-
fendant and appellant, all of which will appear more
in detail from the assignment of errors which is filed
herewith and the statement of the case and the agreed
statement of facts heretofore settled, approved and
allowed.

WHEREFORE, this appellant prays that an ap-

peal may be granted in his behalf to the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in the above-entitled action, duly authenticated, may be sent and transmitted to the said Circuit Court of Appeals for the Ninth Circuit.

Dated at San Francisco, Cal., this 18th day of January, 1916.

GEO. A. MCGOWAN,
Attorney for Gin Dock Sue, Defendant and Appel-
lant. [50]

*In the District Court of the United States, in and for
the Northern District of California, Division
No. 1.*

No. 5493.

UNITED STATES OF AMERICA,
Plaintiff,
vs.
GIN DOCK SUE,
Defendant.

Assignment of Errors.

Comes now Gin Dock Sue, defendant and appellant herein, by his attorney, Geo. A. McGowan, Esq., and in connection with his petition for an appeal herein, assigns the following errors, which he avers occurred upon the trial or hearing of the above-entitled cause, and upon which he will rely upon appeal to the Circuit Court of Appeals for the Ninth Circuit, to wit:

First. That the District Court erred in holding that the judgment and order of deportation made and entered in said matter, was not contrary to law.

Second. That the District Court erred in holding that the judgment and order of deportation made and entered herein was not contrary to the evidence.

Third. That the District Court erred in holding that the judgment and order of deportation, made and entered herein, was supported by the evidence.

Fourth. That the District Court erred in holding that the defendants status as a Chinese official, an attache of the Chinese Consular office in San Francisco, could not be urged upon his behalf in said proceeding because acquired after a clandestine entry.

Fifth. That the District Court erred in not holding that the defendant's status as a Chinese official, an attache of the Chinese Consular office in San Francisco, was a bar to his deportation as [51], sought herein and that as such Chinese official, as aforesaid, he was exempt from the statutes under which the order of deportation herein was made and entered.

Sixth. That the District Court erred in holding that the defendant's mercantile status, as acquired and continued since his clandestine entry, could not be urged upon his behalf in said proceeding.

Seventh. That the District Court erred in not holding that the defendant's status as a merchant for upwards of six years last past was not a bar to his deportation as sought herein.

Eighth. That the District Court erred in not holding that the expiration of the three year limi-

tation after the clandestine re-entry of the defendant into the United States, was a bar to his subsequent deportation, he being a merchant and a Chinese official and at all times, a person other than a laborer.

WHEREFORE, the said Gin Dock Sue prays that the judgment and order of the said United States District Court, in and for the Northern District of the State of California, made and entered herein in the office of the clerk of the said court on the 8th day of October, A. D. 1915, affirming the judgment and order of deportation of the Hon. Francis Krull, United States Commissioner in and for the Northern District of California, made and entered in the office of said Commissioner on the 23d day of May, A. D. 1914, ordering the deportation of the said Gin Dock Sue to China, be reversed, and that this case be remitted to the said lower court with instructions to discharge the said Gin Dock Sue from custody, or grant him a new trial herein.

Dated at San Francisco, California, January 18th, A. D. 1916.

GEO. A. McGOWAN,
Attorney for Defendant and Appellant Gin Dock
Sue. [52]

Due service of the within Notice of and Petition for Appeal and Assignment of Errors and receipt of a copy thereof is hereby admitted this 18th day of January, A. D. 1916.

JNO. W. PRESTON,
U. S. Atty.

[Endorsed]: Filed Jan. 18, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [53]

*In the District Court of the United States, in and
for the Northern District of the State of Cali-
fornia, Division Number One.*

No. 5493.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GIN DOCK SUE,

Defendant.

Order Allowing Petition for Appeal.

On this 19th day of January, A. D. 1916, came
Gin Dock Sue, the defendant and appellant herein,
by his Attorney, Geo. A. McGowan and filed herein
and presented to this Court his petition praying for
the allowance of an appeal to the United States Cir-
cuit Court of Appeals for the Ninth Circuit, in-
tended to be urged and prosecuted by him, and pray-
ing also that a transcript of the record and proceed-
ings and papers upon which the judgment herein was
rendered, duly authenticated, may be sent and trans-
mitted to the United States Circuit Court of Appeals
for the Ninth Circuit, and that such order and fur-
ther proceedings may be had in the premises as may
seem proper.

On consideration whereof, the Court hereby allows
the appeal hereby prayed for, and orders execution
and remand stayed pending the hearing of the said
case in the said United States Circuit Court of Ap-

peals for the Ninth Circuit, and it is further ordered that the said defendant and appellant may remain at large on bail on the bond previously given in this matter, and render himself in execution of whatever judgment may finally be entered herein.

Dated at San Francisco, California, January 19, 1916.

M. T. DOOLING,
District Judge.

[Endorsed]: Filed Jan. 19, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [54]

Citation on Appeal.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the United States of America, and to JOHN W. PRESTON, Esq., United States Attorney in and for the Northern District of California, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the United States District Court for the Northern District of California, First Division, wherein Gin Dock Sue is appellant, and you are appellee, to show cause, if any there be why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be cor-

rected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, First Division, this 7th day of April, A. D. 1916.

M. T. DOOLING,
United States District Judge.

Receipt of a copy of within citation is hereby admitted this 7th day of April, 1916.

JNO. W. PRESTON,
U. S. Attorney.

Copy of the within Citation on Appeal lodged with the undersigned, Clerk of the United States District Court for the Northern District of California, First Division, this 7th day of April, 1916.

W. B. MALING,
Clerk.

C. W. Calbreath,
Deputy.

[Endorsed]: Filed Apr. 7, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [55]

*In the District Court of the United States, in and for
the Northern District of the State of California,
Southern Division, Div. No. One.*

No. 5493.

UNITED STATES OF AMERICA,
Plaintiff and Appellee,
vs.
GIN DOCK SUE,
Defendant and Appellant.

Cost Bond on Appeal.**MASSACHUSETTS BONDING AND INSURANCE COMPANY.**

KNOW ALL MEN BY THESE PRESENTS, That we, Gin Dock Sue, as principal, and Massachusetts Bonding and Insurance Company, as sureties, are held and firmly bound unto the United States of America in the full and just sum of five hundred (500) dollars, to be paid to the said United States of America, its certain attorney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 18th day of August, in the year of our Lord one thousand nine hundred and sixteen.

WHEREAS, lately at a District Court of the United States for the Northern District of California, First Division, in a matter pending in said court, in which said Gin Dock Sue was the defendant and appellant a judgment was rendered against the said Gin Dock Sue, and the said Gin Dock Sue having obtained from said court an order allowing an appeal to reverse the judgment [56] in the aforesaid matter, and a citation directed to the United States of America, through John W. Preston, United States District Attorney for the Northern District of California, citing and admonishing it through its said attorney to be and appear at a United States

Circuit Court of Appeals for the Ninth Circuit to be holden in the City of San Francisco, in the State of California, within thirty days from the date thereof, to wit, April seventh, in the year of our Lord nineteen hundred sixteen.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said Gin Dock Sue shall prosecute said appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

GIN DOCK SUE. (Seal)

MASSACHUSETTS BONDING AND INSURANCE COMPANY. (Seal)

By JOHN H. ROBERTSON, (Seal)

Its Attorney in Fact.

Attest: FRANK M. HALL, (Seal)

Attorney in Fact.

Acknowledged before me the day and year first above written, by Gin Dock Sue, the principal in and to the foregoing bond.

FRANCIS KRULL, (Seal)

United States Commissioner, North'n Dist. of California. [57]

State of California,

City and County of San Francisco,—ss.

On this 18th day of August, A. D. 1916, before me, Grace R. Schmitt, a notary public in and for the City and County of San Francisco, personally appeared John H. Robertson, Attorney in Fact, and Frank M. Hall, Attorney in Fact of the Massachusetts Bond-

ing and Insurance Company, to me personally known to be the individual and officers described in and who executed the within instrument, and they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself deposeth and saith, that they are the said officers of the company aforesaid, and that the seal affixed to the within instrument is the corporate seal of said company, and that said corporate seal and their signatures as such officers were duly affixed and subscribed to the said instrument by the authority and direction of said corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office in the city and county of San Francisco the day and year first above written.

[Seal]

GRACE R. SCHMITT,

Notary Public in and for the City and County of San Francisco, State of California.

Cost bond approved.

CASPER A. ORNBAUN,

Assist. U. S. Atty.

[Endorsed]: Filed Aug. 19, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [58]

*In the District Court of the United States, in and for
the Northern District of the State of California,
Southern Division, Div. No. One.*

No. 5493.

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

GIN DOCK SUE,

Defendant and Appellant.

Stipulation and Order Regarding Original Exhibits.

It is hereby stipulated and agreed by and between the counsel for the respective parties hereto that Defendant's and Appellant's Original Exhibits, "B," and "C," may be withdrawn from the files of the office of the clerk in the above-entitled court, and presented and filed with a certified copy of this stipulation and order in the office of the clerk of the Circuit Court of Appeals in and for the Ninth Judicial Circuit, and when so presented and filed may be considered as part and parcel of the record on appeal in the above-entitled case as the same may be then and thereafter considered by the said United States Circuit Court of Appeals in and for the Ninth Judicial Circuit.

Dated San Francisco, Cal., August 19th, 1916.

JNO. W. PRESTON,

Attorney for Plaintiff and Appellee.

GEO. A. MCGOWAN,

Attorney for Defendant and Appellant.

Order.

Upon reading and filing the foregoing stipulation it is hereby ordered that the said exhibits therein mentioned may be withdrawn for the object and purpose as in said stipulation specified.

Dated San Francisco, Cal., August 19, 1916.

M. T. DOOLING,

United States District Judge. [59]

[Endorsed]: Filed Aug. 19, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [60]

Defendant's Exhibit "B"—Certificate of Residence.

No. 141274.

Original.

W. H. Dillard.

UNITED STATES OF AMERICA.**CERTIFICATE OF RESIDENCE.**

Issued to Chinese Person other than laborer, under the Provisions of Act of May 5, 1892, as amended by the Act approved November 3, 1893.

THIS IS TO CERTIFY, that GIN SOO, a Chinese Person other than Laborer, now residing at Los Angeles, Cal. has made application No. 1041 F to me for a Certificate of Residence, under the provisions of the Act of Congress approved May 5, 1892, as amended by the Act approved November 3, 1893, and I certify that it appears from the affidavit of witness submitted with said application that said GIN SOO was within the limits of the United States at the time of the passage of said Act, and was then residing at Los Angeles, Cal., and that he was at that time lawfully entitled to remain in the United States, and that

the following is a descriptive list of said Chinese Person other than Laborer, viz:

Name: GIN SOO.

Age: Twenty-six (26) years.

Local Residence: No. 318 Marchessault St., Los Angeles, Cal.

Occupation: Pawn-Broker.

Height: 5 ft. 5 in.

Color of Eyes: Brown.

Complexion: Fair.

Physical Marks or Peculiarities for Identification:

Scar on left eyebrow.

And as a further means of identification, I have affixed hereto a photographic likeness of said GIN SOO. [61]

Given under my hand and seal this twenty-third day of January, 1900, at San Francisco, State of California.

[Seal]

JNO. C. LYNCH,

Collector of Internal Revenue, First District of California.

(Chinese Picture With Number 141,274 and Name Gin Soo, Thereon.)

[Written across face of above]: Issued in lieu of original certificate of residence Nos. 82,541 and 138,-680 lost. Proof of said loss now on file in this office.

JNO. C. LYNCH,
Collector.

[Endorsed]: U. S. Dist. Court No. 5493. U. S. v. Chin Dock Sue. Deft. Exhibit No. "B." LSM. May 13, 1915. [62]

Defendant's Exhibit "C"—Certificate of Registration.

Hon. Collector of Customs:

Sir: I hereby certify that the registration certificate hereto attached and numbered 141,274, is genuine, as proven by comparison with the records on file in this office.

[Seal]

M. LICHTENSTADTER,
Deputy Collector Internal Revenue, First District
California. [63]

To the Honorable Collector of Customs, District of
Los Angeles, California.

Sir: I respectfully apply for a Certificate of Departure as provided for under the Act of September 13th, 1888, and the Treaty between the United States of America and the Empire of China, signed March 17th, 1894, as I am a Chinese laborer residing in the United States and in the City of Los Angeles, State of California, with my wife, Young Shee, Shiu Fung, and have property therein of the value of \$1,000.00 or debts of like amount due me and pending settlement, as hereinafter set forth.

My property hereinafter set forth is *bona fide*, and not colorably acquired for the purpose of evading said Act. The debts due me hereinafter set forth are unascertained and unsettled, and not promissory notes or other similar acknowledgments of ascertained liability.

At least a month from date hereof I intend to depart to China via the Port of San Francisco with the

intention of returning via said Port within one year from such date of departure.

(Chinese picture.)

My photograph hereto attached is a correct and faithful likeness of me.

My description is as follows:

Name, GIN SOO.

Age, Thirty-five years.

Local Residence, Los Angeles, Cal.

Occupation, Cigar Vendor.

Height, 5 ft. 5 in.

Color of eyes, Brown.

Complexion, Fair.

Physical Mark: Scar on left eye-brow.

[Seal]

WM. S. WATERS,

Deputy Collector. [64]

Weight at present, 183 lbs.

Certificate of Residence, No. 141274.

Issued at San Francisco, Cal. January 23, 1900, in lieu of original Certificates Nos. 82541 and 138680.

DESCRIPTION OF PROPERTY OWNED BY
APPLICANT AND FAMILY OF SAME.

An undivided interest in QUONG HOP COMPANY, a vegetable garden, in Los Angeles County, California, being land leased from B. T. Rozelle of Compton, Los Angeles County, Cal. The amount of said interest being over \$1000.00.

Respectfully yours,

GIN SOO.

Subscribed and sworn to before me, this 21 day of January, A. D. 1903.

WM. S. WATERS,
Deputy Collector.

Custom-House, District of Los Angeles, California.

I HEREBY CERTIFY that after a thorough examination I am satisfied that the foregoing applicant is registered; that his foregoing statements are true; that the photograph hereto attached is a correct and faithful likeness of him, and that his height, weight and description of physical marks are accurately given.

WITNESS my hand and official seal this 11 day of Feby., A. D. 1903.

WM. S. WATERS,
Deputy Collector. [65]

[Endorsed]: U. S. Dist. Court No. 5493. U. S. v. Chin Dock Sue, Deft. Exhibit No. C. LSM. Deputy Clerk. May 13, 1915. [66]

*In the District Court of the United States, in and for
the Northern District of California, Division
Number One.*

UNITED STATES,

Plaintiff,

vs.

GIN DOCK SUE,

Defendant and Appellant.

**Order Extending Time Thirty Days from and After
May 6, 1916, to Docket Cause.**

Good cause appearing therefor, and upon motion of George A. McGowan, Esquire, attorney for the defendant and appellant herein, it is hereby ordered that the time within which the above-entitled case may be docketed in the office of the clerk of the United States Circuit Court of Appeals, in and for the Ninth Circuit, may be and the same is hereby extended for the period of thirty (30) days from and after the date hereof.

Dated San Francisco, California, May 6th, 1916.

M. T. DOOLING,
U. S. District Judge.

Service of the within order and receipt of a copy thereof is hereby admitted this 6th day of May, 1916.

JNO. W. PRESTON,
U. S. Attorney.

[Endorsed]: Filed May 6, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [67]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Monday, the 5th day of June, in the year of our Lord, one thousand nine hundred and sixteen. PRESENT: The Honorable MAURICE T. DOOLING, District Judge.

No. 5493.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GIN DOCK SUE,

Defendant and Appellant.

**Order Extending Time Thirty Days from and After
June 5, 1916, to Docket Cause.**

In this matter on motion of Geo. A. McGowan, Esq., Attorney for the petitioner and appellant herein, the Court ordered that the time within which the above entitled case may be docketed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, may be and the same is hereby extended for the period of thirty (30) days from and after the date hereof. [68]

*In the District Court of the United States, in and for
the Northern District of California, Division
Number One.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GIN DOCK SUE,

Defendant and Appellant.

**Order Extending Time Thirty Days from and After
July 1, 1916, to Docket Cause.**

Good cause appearing therefor, and upon motion of George A. McGowan, Esquire, attorney for the de-

fendant and appellant herein, it is hereby ordered that the time within which the above-entitled case may be docketed in the office of the clerk of the United States Circuit Court of Appeals, in and for the Ninth Circuit, may be and the same is hereby extended for the period of thirty (30) days from and after the date hereof.

Dated San Francisco, California, July 1st, 1916.

M. T. DOOLING,
U. S. District Judge.

Service of the within order and receipt of a copy thereof is hereby admitted this 1st day of July, 1916.

JNO. W. PRESTON,
U. S. District Attorney.

[Endorsed]: Filed Jul. 31, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [69]

*In the District Court of the United States, in and for
the Northern District of California, Division
Number One.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GIN DOCK SUE,

Defendant and Appellant.

**Order Extending Time Thirty Days from and After
July 31, 1916, to Docket Cause.**

Good cause appearing therefor, and upon motion of George A. McGowan, Esquire, attorney for the defendant and appellant herein, it is hereby ordered

that the time within which the above-entitled case may be docketed in the office of the clerk of the United States Circuit Court of Appeals, in and for the Ninth Circuit, may be and the same is hereby extended for the period of thirty (30) days from and after the date hereof.

Dated San Francisco, California, July 31st, 1916.

WM. M. MORROW,

U. S. Circuit Judge, now Presiding in the Above-entitled Court.

The foregoing order is hereby agreed to.

JOHN W. PRESTON,

United States Attorney.

C. G. H.

Service of the within order and receipt of a copy thereof is hereby admitted this 31st day of July, 1916.

JOHN W. PRESTON,

U. S. Attorney.

C. G. H.

[Endorsed]: Filed Jul. 31, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [70]

In the District Court of the United States, in and for the Northern District of the State of California, Southern Division, Div. No. One.

No. 5493.

UNITED STATES OF AMERICA,

Plaintiff and Appellee,

vs.

GIN DOCK SUE,

Defendant and Appellant.

**Order Extending Time Six Days from and After
August 30, 1916, to Docket Cause.**

Good cause appearing therefor, and upon motion of George A. McGowan, Esquire, attorney for the petitioner and appellant herein, it is hereby ordered that the time within which the above-entitled case may be docketed in the office of the clerk of the Circuit Court of Appeals, in and for the Ninth Judicial Circuit, may be and the same is hereby extended for the period of six days from and after the date hereof.

Done in open court this 30th day of August, A. D. 1916.

M. T. DOOLING,
United States District Judge, now Presiding in the
Above-entitled Court.

The foregoing extension is hereto consented to.

JNO. W. PRESTON,
United States Attorney.

Due service and receipt of a copy of the within order is hereby admitted this 30 day of Aug., 1916.

JNO. W. PRESTON,
U. S. Attorney, Northern District of California,
Attorney for Plaintiff.

[Endorsed]: Filed Aug. 30, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [71]

Certificate of Clerk U. S. District Court as to Transcript on Appeal.

I, W. B. Maling, Clerk of the District Court of the United States of America for the Northern District

of California, do hereby certify that the foregoing 71 pages, numbered from 1 to 71, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of The United States vs. Gin Dock Sue, No. 5493, as the same now remain on file and of record in the office of the clerk of said District Court; said Transcript having been prepared pursuant to and in accordance with the "Praecipe" (a copy of which is embodied in this Transcript), and the instructions of the attorney for defendant and appellant herein.

I further certify that the costs for preparing and certifying the foregoing Transcript on Appeal is the sum of thirty-one dollars and ninety cents (\$31.90) and that the same has been paid to me by the attorney for the appellant herein.

Annexed hereto is the Original Citation on Appeal issued herein (page 73).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 30 day of August, A. D. 1916.

[Seal]

W. B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk.

[Ten Cent Internal Revenue Stamp. Cancelled
8/30/16. C. W. C.] [72]

Citation on Appeal.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the United States of America, and to JOHN W. PRESTON, Esq., United States Attorney in and for the Northern District of California, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal of record in the clerk's office of the United States District Court for the Northern District of California, First Division, wherein Gin Dock Sue is appellant and you are appellee, to show cause if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable M. T. DOOLING, United States District Judge for the Northern District of California, First Division, this 7th day of April, A. D. 1916.

M. T. DOOLING,
United States District Judge. [73]

[Endorsed]: No. 5493. United States District Court for the Northern District of California, First Division. Gin Dock Sue, Appellant, vs. The United

States, Appellee. Citation on Appeal. Filed Apr. 7, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Receipt of a copy of within citation is hereby admitted this 7th day of April, 1916.

JNO. W. PRESTON,

U. S. Attorney.

Copy of the within Citation on Appeal lodged with the undersigned, Clerk of the United States District Court for the Northern District of California, First Division, this 7th day of April, 1916.

W. B. MALING,

Clerk.

C. W. Calbreath,

Deputy.

[Endorsed]: No. 2858. United States Circuit Court of Appeals for the Ninth Circuit. *Gin Dock Sue*, Appellant, vs. The United States of America, Appellee. Transcript of the Record. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filed September 5, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 2858

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GIN DOCK SUE,

Defendant and Appellant,

VS.

THE UNITED STATES OF AMERICA,

Plaintiff and Appellee.

BRIEF FOR APPELLANT

GEO. A. MCGOWAN,

Attorney for Appellant.

Filed this.....day of February, 1917.

FRANK D. MONCKTON, *Clerk*

Filed

By.....Deputy Clerk.

FEB 24 1917

F. D. Monckton,

Clerk.

No. 2858

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GIN DOCK SUE, <i>Defendant and Appellant,</i> VS. THE UNITED STATES OF AMERICA, <i>Plaintiff and Appellee.</i>
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BRIEF FOR APPELLANT.

Statement of the Case.

The facts of this case as far as heard by the District Court are not in dispute and are to be found in the evidence introduced before the Commissioner (Tr. 15-33), said proceedings having been transcribed and filed by consent in the District Court (Tr. 33-34), and the additional proceedings before the District Court, the facts as there additionally agreed and stated by counsel (Tr. 33-47), and in addition the stipulation as to the ultimate facts appearing from the Immigration Record (Tr. 50-52), the record itself having been held inadmissible.

A stipulation and order approving statement of the case and agreed statement of facts with respect

thereto is contained in the transcript, pages 53 and 54. There is some confusion in the record over the family name of the defendant and appellant, it being given in some places as Chin whereas it should have been spelled Gin. This is covered in the stipulation and order mentioned. The stipulation and order refers to the transcript of the hearing had on May 13th before the District Court and all of the prior proceedings were therein introduced in evidence. The facts as far as heard by the District Court are as follows:

The appellant in this action, Gin Dock Sue, is an alien Chinese person who first entered the United States in the year 1881 (Tr. 24). He continued to reside in the United States, and when Congress subsequently passed the Chinese Registration Act the defendant complied therewith by procuring a certificate of registration, which was numbered 138680. This certificate was subsequently lost or destroyed, and upon satisfactory proof thereof being submitted to the Collector of Internal Revenue for the Port and District of San Francisco, a duplicate thereof was issued, which duplicate bore the number of 141274. Both of these certificates were issued to the defendant in the name of Gin Soo, describing him as a person other than a laborer, and residing in Los Angeles, California; that his local address was No. 38 Marchesault Street, Los Angeles; that his occupation was that of a pawnbroker, and that annexed to the said certificate was a photographic likeness of the person to whom the

certificate was issued (Tr. 30 and 66-67, Exhibit B). The defendant desired to go to China upon a temporary visit and filed an application to depart as a laborer, submitting his certificate of registration, and as evidence of his right to make the trip in question, that he had a wife living in this country, and that he also had property interests here valued in excess of the sum of \$1000. The representations contained in the application to depart were examined and approved by William S. Walter, the deputy Collector of Customs for Los Angeles (Tr. 31 and 68-70, Exhibit C). The defendant then came to San Francisco, and sought to depart for China upon said laborer's certificate, but he was prevented from doing so by a ruling of the department, which held that Chinese persons who possessed certificates issued to them, in which their occupation was described as a person "other than a laborer," could not avail themselves of the provisions of the law applying to "laborers," notwithstanding they had the necessary property or family qualifications. The defendant was thereupon prevented from going to China as a laborer (Tr. 31-32). The certificate of residence of the detained has been submitted in evidence, as also the latter portion of printed decision No. 10 of the Department of Commerce and Labor, quoting Treasury decision No. 23525 of Feb. 17, 1902, which confirmed the holding of the department in refusing to the defendant a laborer's return certificate, and the testimony of the defendant further show-

ing that a person having the occupation of a pawnbroker was then considered as a person other than a laborer and a merchant (Tr. 35-36). The defendant thereafter sought to go to China as a merchant, and departed from the United States from the Port of San Francisco, and by way of the Port of Honolulu, and he did so depart on the 9th day of July, 1907, and the defendant returned to the United States by way of the Port of Honolulu and arrived at the Port of San Francisco on the 14th day of July, 1908, upon which trip he had ticket No. 51 on the S. S. "Korea" (Tr. 50-51). The entire absence of the defendant from the United States, counting the departure from Honolulu and the arrival at Honolulu, that port being the last of the United States touched on the outward voyage, and the first United States port touched on the inward voyage, being under the period of one year (Tr. 32). The defendant claimed as his right to enter the United States that he was a resident Chinese merchant, lawfully domiciled therein. The application was examined by the proper immigration officials, and was denied upon the 26th day of August, 1908. An appeal was taken from this adverse decision to the Secretary of Commerce and Labor, which official confirmed the excluding decision of the port officials. Thereafter an application for a rehearing was made in which the contention was advanced that a conspiracy existed among the enemies of the defendant to prevent his re-entry into the United States, and

that he was a merchant as claimed, and that the true facts had not been brought to light in the former examination of his case. This application for a rehearing was partially investigated, and was being considered by the immigration officials when upon the 28th day of November, 1908, the defendant escaped from his place of detention at the old Pacific Mail Dock in San Francisco, and thereafter upon the date indicated the following order was made:

“San Francisco, Dec. 8, 1908. This man escaped from the Pacific Mail Steamship Company, and is a fugitive—Application for a rehearing denied. H. H. North, Commissioner.” (Tr. 43-44 and 50-52).

It is claimed upon behalf of the defendant that thereafter he purchased a mercantile interest in a store in San Luis Obispo, and remained engaged there as a merchant, engaged in buying and selling merchandise at a fixed place of business for about a period of two and one-half years (Tr. 45), and that thereafter he came to San Francisco, and became engaged in San Francisco as a merchant, and has ever since said time been so engaged in business as a merchant engaged in buying, selling and dealing in merchandise at a fixed place of business, and engaged in the performance of no manual labor of any kind or description whatever. The San Francisco store of which defendant was and is a member as aforesaid is the firm of Chung Lung Jan and Co., 827 Grant Avenue, San Francisco (Tr. 18-22).

The defendant during the month of November, 1913, was elected to the office of Secretary of the Ning Yung Association, one of the Chinese Six Companies. The said office of Secretary is an official position, and the holder thereof is an official of the Chinese Government, and an ex-officio attache of the Chinese consulate of the Port and District of San Francisco, and as such an official of the Chinese Government (Tr. 15-18, 23-24 and 37-40).

The defendant herein was arrested upon a complaint sworn to on the 18th day of January, 1913, charging him under the name of Yung Lung Soo, alias Chin Tock Sing, with being a Chinese manual laborer unlawfully within the United States without a certificate of residence (Tr. 2-3). It appears that the defendant did have a certificate of residence, therefore a second complaint was filed against the defendant in which he was charged under the names of Yeung Lung Soo, alias Gin Dock Sue. This latter complaint was sworn to upon the 18th day of March, 1914, and does not charge the defendant with being a laborer but does charge him with being a Chinese person who had illegally entered the United States and who had not been found admissible thereto by the immigration authorities (Tr. 6-8).

Upon the trial of this matter before the Commissioner and before the Court it is established by the testimony and has been admitted that the defendant is an alien Chinese person who entered the

United States as above set forth; that he does have a certificate of registration, that he did apply to go to China as a laborer; that he did not so depart for the reasons stated in his testimony; that thereafter he attempted to go to China as a merchant, and be landed upon his return; that his entire absence from the United States was within the period of one year; that he was denied readmission into the United States; that he applied for a rehearing; that during the pendency thereof he escaped from custody. That the defendant ever since has been, and now is a merchant, and that since November, 1913, defendant has in addition thereto been a Chinese official as hereinbefore stated, and an ex-officio attache of the Chinese consulate for the Port and District of San Francisco. The Government in this matter has introduced no evidence nor made any showing to offset the mercantile or official status of the defendant, and seem to content themselves solely with the admitted fact of the clandestine re-entry of the defendant into the United States upon the 28th day of November, 1908, claiming that no legal status could thereafter be predicated upon such an irregular entry.

It might be further stated that upon the 27th day of January, 1914, the Commissioner of Immigration forcibly took the defendant in this matter into custody, and took him to the immigration station, and there held him for the purpose of deporting the defendant to China, upon the theory that he had escaped from the jurisdiction of the immi-

gration officers, and that now that they had him back into custody they could deport him upon the unexecuted order denying him admission in the United States entered upwards of five years prior to that time. A writ of habeas corpus was applied for in the lower Court, which is numbered 15527 in the records and files of the District Court. It is shown in this matter that the defendant was a merchant, a member of the firm of Quong Sang and Co. at San Luis Obispo for about two and a half years after his clandestine entry into the United States, and further that the said defendant was a Chinese official, as hereinbefore set forth. Upon a hearing had upon this matter in chambers the Court decided that the immigration officials had lost their jurisdiction by the lapse of time, and that if the defendant was to be deported that could only be accomplished by a judicial deportation proceeding, and thereupon the defendant was discharged from custody, and the judicial deportation proceeding was thereafter proceeded with. The amended complaint alleging the exact charge against the defendant with clandestinely re-entering the United States was filed after the disposition of the habeas corpus matter (Tr. 41).

The questions presented in this matter are three:

First, may the defendant as such Chinese official be deported out of the United States under and by virtue of the terms of the Chinese Exclusion and Restriction Acts?

Second, may the defendant who has been engaged in business as a Chinese merchant in California for six years and a half last past be deported, he not being a laborer, for a prior irregular re-entry?

Third, has not the Court now jurisdiction in this matter to examine into the mercantile status of the defendant for the year prior to his departure from the United States on the 9th day of July, 1907?

FIRST.

MAY THE DEFENDANT AS SUCH CHINESE OFFICIAL BE DEPORTED OUT OF THE UNITED STATES UNDER AND BY VIRTUE OF THE TERMS OF THE CHINESE EXCLUSION AND RESTRICTION ACTS?

The evidence in this matter shows that it is conceded that this defendant is and has been since November, ¹⁹¹³~~1911~~, a Chinese official. This is shown by the testimony of the defendant, and different white witnesses who testified upon his behalf, and also upon the testimony of the Chinese Consul.

The Chinese Consul for this port testified under oath that this defendant was a Chinese official connected with and attached to the Chinese consulate of this port and district, and further, that he was a member of the advisory board attached to the Chinese consulate and that members of this board had the status of Chinese officials and were landed as such direct from the steamer upon their arrival from China, and that neither the restrictions of the Immigration Act nor of the Chinese exclusion laws had any application to them at all, for the

reason that as officials they were exempt from the operations of the said laws. The statute which shows the exemption of any such official is the Act of May 6, 1882, as amended by the Act of July 5, 1884, Section 13 thereof, providing as follows (*Italics volunteered*):

“That this act shall not apply to diplomatic *and other officers* of the Chinese or other Governments traveling upon the business of that Government, whose credentials shall be taken as equivalent to the certificate in this act mentioned, and *shall exempt them and their body and household servants from the provision of this act as to other Chinese persons.*”

The more recent Act of Congress, that of September 13, 1888, also contains this exemption in Section 14 thereof, which provides as follows (*Italics volunteered*):

“That the preceding sections shall not apply to Chinese diplomatic *or consular officers or their attendants*, who shall be admitted to the United States under special instructions of the Department of Commerce and Labor, without production of other evidence than that of personal identity.”

A reading of these two sections distinctly shows that it is not alone the diplomatic officer who is exempted from the operation of these acts, but consular officers and their attendants and also other officers of the Chinese or other governments. It is in evidence that the political branch of the Government of the United States, through the immigration officers, recognizes the official status of men

holding a position similar to this defendant, and not only permits them to land from China direct from the steamer as being entirely exempt from the operations of these laws, but their families and servants as well are entitled to and receive this exemption. This is an actual condition of affairs which exists at this port and has ever since the Chinese exclusion laws have been in force, and during all of these thirty odd years men holding these positions have been recognized as officials and have received all the courtesies which belong to men of their rank. It is shown by the testimony of the Chinese Consul General that the position of this defendant is an elective one, and that these different Chinese companies in reality correspond to the different political districts of China from which the Chinese residents within the United States emigrated; that these societies are political in character and their object and purpose is to take care of the interests and rights of the different Chinese persons coming from those particular districts in China. The Ning Yung Association, of which the defendant is the Secretary, is composed of those persons who formerly lived in the Sun Ning District in China, and its membership is the largest of any of the different official Chinese associations. The President of this company was present at the trial, though not sworn as a witness, and he exhibited his credentials issued by the Chinese minister at Washington, and it was further in evidence that he was recently landed direct from

China, accompanied by his body servant, and that the provisions of the Chinese Restriction Acts had no application to him, and more recently two of his sons have been landed in the United States (Tr. 46-47). The Chinese Consul General further testified that in those instances where the elected official resided in this country they did not apply to the Chinese Minister for a certificate for the reason that the person was already domiciled in this country, but that in those instances where the elected official resided in China, that then the certificate was asked for and obtained, and was always recognized by our Government. He further testified that if this defendant had resided in China at the time of his election that a certificate would have been obtained from the Chinese Minister and the defendant would have been immediately landed upon it. The testimony of the Consul General further shows that this man is a Chinese official attached to the consulate at this port and district. The Government has not met this showing nor answered it in any manner, shape or form, and the very obvious reason for this is that it is *unanswerable*. It stands to reason that the official status of the defendant being established and conceded, that by the very terms of the Acts which are the source of the Court's jurisdiction, that the status of this defendant as such official is completely exempt from the provisions of the Acts, and as to him they have absolutely no application whatsoever.

The Chinese Restriction Act of May 6, 1882, as amended by the Act of July 5, 1884, provided that all Chinese of the exempt class about to come to the United States should have a certificate and that none should be landed without it, but the Supreme Court, in the case of *Lau Ow Bew v. U. S.*, 144 U. S. 47, there decided that where the member of the exempt class is domiciled in this country that of course this certificate is not required of him. The opinion in this case was written by Chief Justice Fuller and in reaching this point the following language is used (page 521, Sup. Ct. Reporter, Vol. 12):

“But Chinese merchants domiciled in the United States and in China only for temporary purposes, *animo revertendi*, do not appear to us to occupy the predicament of persons ‘who shall be about to come to the United States’, when they start on their return to the country of their residence and business. The general terms used should be limited to those persons to whom Congress manifestly intended to apply them; and they would evidently be those who are about to come to the United States for the first time, and, therefore, might properly be required to apply to their own government for permission to do so, as also to so identify them as to distinguish them as belonging to the classes who could properly avail themselves of such leave.” * * *

“Tested by this rule, it is impossible to hold that this section was intended to prohibit or prevent Chinese merchants, having a commercial domicile here, from leaving the country for temporary purposes, and then returning to and re-entering it; and yet such would be its

effect, if construed as contended for on behalf of appellee.”

Tested by this rule it is obvious that this defendant being domiciled and residing in this country, he would not have any occasion to have a certificate issued to him, but would merely need to present evidence of his official status in the language of the Act last above mentioned, which does not require any certificate at all, but only requires evidence of *personal identity*. In this case we have presented evidence of the personal identity of the defendant and also evidence of his official status and standing. These facts have been established by the testimony of the Chinese Consul-General for this port, Mr. Ow Young Kay, the Secretary of the Chinese Six Companies; Gee Sam King, the defendant himself, and the two white witnesses who testified as to his mercantile status and also knew him as an official. The Government has not controverted or sought to meet this showing in any way, manner, shape or form, and it must therefore be taken as conclusively established that this defendant has the status of a Chinese official, connected with the Chinese consulate for this port and district, and as such official he is entitled to the protection of the two sections of the Chinese Exclusion or Restriction Acts hereinabove mentioned. These same two Acts are the ones which the Government insists are the source of its authority for instituting and prosecuting this present case, and it might be added that they also are the sole source of the Court's author-

ity and jurisdiction in deportation cases of this character, and when it is shown by almost the concluding sections in each of these two Acts that Chinese officials are absolutely exempted from the provisions of the Act, that the entire Act shall not apply to them, it leads us to the conclusion that the only order which can lawfully be entered in this case is one that will order the defendant discharged from custody upon the ground of his official status, which exempts him from the provisions of these Acts.

By reason of the fact that merchants, teachers, students and travelers for curiosity and pleasure are referred to as members of the so-called exempt classes, I feel it necessary to say that their exemption does not have reference to the law itself but rather to their exemption from among those Chinese persons who may not come to this country while the exemption of the official is much a different thing, for not only may he come with his servants, both body and household, and his attendants, but they are all *absolutely exempted from the provisions of the law*. In this case therefore the Government is trying to deport an *official* of the *Chinese Government* under a law which by its own terms shall not apply to them.

The official status of this defendant clearly exempts him from the operation of such a proceeding as it is attempted to institute and prosecute against him in the case at bar. The proper way to remove

this defendant from the United States would be for the State Department to make representations to the Chinese Minister looking to the return to China of this attache of the Chinese consulate at San Francisco, upon the ground that his presence in such official capacity is unwelcome to the Government of the United States. I doubt very much if the political branch of the Government, in view of all of the facts, would feel warranted in taking any such action against this Chinese official.

I reserve for presentation under the next portion of this brief the question springing from the irregular entry into the United States of the defendant, merely contenting myself with the observation in this place that such irregular entry did not prevent or prohibit this defendant from being elected to the political position which he occupies. It is clearly shown that such officials are elected politically by the Chinese people, and are recognized by the Minister and Chinese Consul-General for this port in view of their said election. Recognition of this defendant's official position as an attache of the Chinese consulate is by the Consul-General of China himself in his deeds in connection with the performing of the duties of his office, and he has testified under oath in this proceeding that this defendant has been so recognized by him as such an official and attache of his consulate.

SECOND.

MAY THE DEFENDANT WHO HAS BEEN ENGAGED IN BUSINESS AS A CHINESE MERCHANT IN CALIFORNIA FOR SIX YEARS AND A HALF LAST PAST BE DEPORTED, HE NOT BEING A LABORER, FOR A PRIOR IRREGULAR RE-ENTRY?

It is contended upon behalf of the Government in this matter that an illegal residence follows an irregular entry, and that irrespective of the passage of time a legal residence cannot be predicated upon or follow an irregular entry. We take issue on this, and point to the following cases:

In the case of *Tsoi Sim v. United States*, 116 Fed. Rep., p. 925, in which a Chinese girl, unlawfully within the United States because she did not secure a certificate of registration, thereafter married a citizen of the United States and cured the illegality of her residence, the Court held:

“Whatever effect her error of omission in failing, during a few years of her infancy, to obtain a certificate of registration, if any she was entitled to, it certainly did not deprive her of the right to marry an American citizen lawfully domiciled in this country. This she did. By this act, her status was changed from that of a Chinese laborer to that of a wife of a native-born American. Her husband is not before the Court, but his rights, as well as hers are involved. * * *

“The wife has the right to live with her husband, enjoy his society, receive his support and maintenance and all the comforts and privileges of the marriage relations. These are her, as well as his, natural rights. By virtue of her marriage, her husband’s domicile became her domicile, and thereafter she was entitled to live with her husband, and remain in this country.”

In the Government's brief filed before the Commissioner, commenting upon this case, the District Attorney states that the rights of the woman's husband were so involved that she could not be deported. In the case of *Low Wah Suey v. Backus*, 255 U. S. 460, the Supreme Court held that a Chinese woman who marries a citizen is not exempt from deportation if she commits any social dereliction, that is, if she becomes a prostitute, but her exemption is complete as long as she properly behaves herself. In the case at bar it is obvious that the rights of the Chinese Government to the services of its official are also involved, and their attention has been called to the Court. It is obvious that a complete exemption follows:

In the case of *Hopkins v. Fachant*, 130 Fed. Rep. p. 839, a woman, under an executive order of deportation upon the charge of being an alien prostitute illegally within the United States and deportable as such, married a citizen of the United States, the syllabus being as follows:

“Where an alien woman, who has come into this country, pending proceedings for her deportation under the immigration laws, marries a citizen of the United States, she at once takes the status of her husband, and, unless released from custody, is entitled to be discharged on a writ of habeas corpus.”

Both of these cases are decisions of the Circuit Court of Appeals for this circuit.

In the syllabus just quoted from it is mentioned that the marriage took place “pending proceedings

for her deportation,” and it is aimed to attract attention to the record of the case itself, which will show that the marriage in this case actually took place, not only after the warrant of deportation had been issued, but after the habeas corpus proceedings had been commenced in Court. In other words, the marriage was not mentioned in the petition for a writ of habeas corpus, because it had not yet taken place. In the brief filed before the Commissioner by the Government in this case they contended that this decision of the Circuit Court of Appeals was “virtually overruled” by the case of *Ex parte Kaprielian*, 188 Fed. 694. The reading of this last mentioned decision will show that the Court did not claim that its decision overruled the decision of our Circuit Court of Appeals, but on the contrary that Court sought to distinguish the two cases.

In the case of *Ex parte Ow Guen*, reported in 148 Fed. Rep., p. 926, the petitioner was a Chinese laborer in the United States who failed to procure a certificate of registration and upon a trip to China sought re-entry upon the ground of being a merchant. He was denied a landing by the immigration officials upon account of the illegality of his prior residence. The Court in this case says, at page 927, above cited, as follows:

“This Section 6, however, does not provide that an unregistered laborer should not remain in the United States, but only if found there by certain officers, he should be adjudged to be unlawfully there and might be taken before a

judge and ordered to be deported. He would in fact be here and be entitled to all the rights of a resident alien till so proceeded against, adjudged and ordered. He would have, among others, the right to become a merchant, and when he did so he had all the rights under the law, of a merchant."

In the Government's brief filed before the Commissioner, commenting upon this case, the District Attorney states that it was a case of a returning merchant who failed to show to the immigration authorities that he was a merchant in Boston, and did thereafter show to the Court that he was a merchant at Lowell, Mass. What the District Attorney states about the Ow Guen case is perfectly true, but it is also true that the other point to which attention has just been called is involved, and was decided exactly as set forth, and that is to the effect that a Chinese person might be illegally in the United States, that such a Chinese person had a right to remain here until he was proceeded against, adjudged and ordered deported, as provided in the law, and that while he was here, and before he was so proceeded against he would have "the right to become a merchant," and when he did so he had all the rights under the law of a merchant. What is held here with respect to the acquiring of a mercantile status is even more true as applied to acquiring an official status, and becoming an attache of the Chinese consulate.

In the case of *In re Tom Hon*, reported in 149 Fed. Rep., p. 842, a Chinese person made application

to enter the United States through the medium of a writ of habeas corpus, after having been denied admission by the immigration authorities. He was released upon bond and thereafter was ordered deported. He could not be found and the order of deportation was unexecuted. The defendant procured a certificate of registration and the Court decided that the petitioner was lawfully domiciled within the United States, notwithstanding the prior judgment of illegality of his residence, the syllabus being as follows:

“A judgment in habeas corpus proceedings, remanding a Chinese person to the custody of a master of a vessel in which he immigrated, for deportation was vacated by the subsequent passage of Act. Cong. May 5, 1892, c. 60, 27 Stat. 25, as amended by Act Nov. 3, 1893, c. 14, 28 Stat. 7 (U. S. Comp. St. 1901, p. 1320), providing for the registration of Chinamen entitled to remain in the country and the registration of petitioner thereunder.”

In the Government's brief filed before the Commissioner, the Government attempts to dispose of the Tom Hon case by stating that the alien's order of deportation was revoked by the subsequent passage of a law and that the alien's registration thereunder gave him the right to remain in this country. It is obvious that Tom Hon was a resident of this country, under a judicial order of deportation, and was illegally resident herein at the time of the passage of the Registration Act, and that Tom Hon did not present those facts to the Collector of Inter-

nal Revenue when he applied for and received his certificate of registration.

The similarity between the case of Tom Hon and the case of this defendant is that this defendant had the right under the law to continue or assume a mercantile status, and when he did so he became a member of the privileged class, and as the statute of limitations for a surreptitious entry has run its course, he cannot now be deported. It is further obvious that the conferring of an official status upon the defendant which exempts him from the operation of these two Chinese Exclusion or Restriction Acts has even a greater legal effect than the Act of Congress relied upon by the Government in explaining the Tom Hon decision in their brief filed before the Commissioner.

The present general immigration law provides for the deportation of objectionable aliens out of the United States. Those aliens who are objectionable by reason of personal immorality may be deported at any time; in other words, the time limit has been removed with respect to social derelictions, but the present immigration law has its three-year limitation as applied to all other offenses, which include those of surreptitious entry. The general immigration law formerly placed the limitation at two years, and at a still earlier period the limitation was placed at one year. A case which arose under the one-year limitation is that of *In re Russomanno*, reported in 128 Fed. Rep., page 528, where the Government sought to deport a boy who

had illegally entered the country, and the Court held that this could not be done unless within one year after the entry. The decision follows:

“The authority to deport this alien is to be found in the Act of 1891 (Act March 3, 1891, c. 551, Sec. 11, 26 Stat. 1086), U. S. Comp. St. 1901, p. 1299, not in the Act of 1903. Inasmuch as he was not seized, even for purposes of deportation, until more than one year had elapsed after his last entry into the United States, the time within which he could be taken into custody under the act of 1891 had fully expired.

“The prisoner is discharged.”

A case which illustrates the two-year limitation is as follows:

In the case of *Botis vs. Davies*, 173 Fed. Rep. 996, it was sought to deport a person from the United States. The syllabus follows:

“Under Immigration Act March 3, 1903, c. 1012, 32 Stat. 1213, which provides in Section 20 that any alien who shall come into the United States ‘in violation of law’ may be deported at any time within two years after arrival, and in Section 21 that the Secretary of Commerce and Labor shall deport aliens found in the United States ‘in violation of this act,’ within three years after landing, a ‘deportation’ for entering in violation of any prior law can only be made within two years, which means the actual deportation, and not merely the commencement of proceedings.”

The Supreme Court of the United States has decided that Chinese persons who surreptitiously enter the United States may only be deported under the provisions of the general immigration law within

the period of three years of their surreptitious entry. The case is that of *United States vs. Wong You*, 223 U. S. 67, in which the Court held:

“This is a writ of habeas corpus. It was dismissed by the District Court (176 Fed. 933), but was sustained by the Circuit Court of Appeals, which ordered the parties concerned to be discharged from custody, 104 C. C. A. 535, 181 Fed. 313. The parties are Chinamen who entered the United States surreptitiously, in a manner prohibited by the Immigration Act of February 20, 1907, chap. 1134, No. 36, 34 Stat. at L. 898, 908, U. S. Comp. Stat. Supp. 1909, pp. 447, 466, and the rules made in pursuance of the same, if applicable to Chinese. They were arrested in transitu and ordered by the Secretary of Commerce and Labor to be deported. Nos. 20, 21. But as it transpired in the evidence that they were laborers, the Circuit Court of Appeals held that they could be dealt with only under the Chinese Exclusion Acts of earlier date. Those acts make it unlawful for any Chinese laborer to come from any foreign place into the United States, or, having so come, to remain there, and provide a different procedure for removing them. Hence it was concluded that such persons were tacitly excepted from the general provisions of the Immigration Act, although broad enough to include them, and although of later date.

“We are of opinion that the Circuit Court of Appeals made a mistaken use of its principles of interpretation. By the language of the Act any alien that enters the country unlawfully may be summarily deported by order of the Secretary of Commerce and Labor at any time within three years. It seems to us unwarranted to except the Chinese from this liability because there is an earlier, more cumbrous proceeding which this partially overlaps.”

These seven cases just cited clearly show that aliens entering the United States illegally, and though by their own act defeating the proper operation of the law, none the less may also by their own act correct the illegality of their residence. In the case of Tsoy Sim, *supra*, the woman was illegally in the United States, and corrected the illegality of her residence by marrying a citizen. In the case of Hopkins v. Fachant, the woman was actually under an executive order of deportation when she married a citizen, and she being a Caucasian woman, by her marriage immediately took the status of her husband, and was invested with full rights of citizenship. In the case of Tom Hon there was an actual and unexecuted judicial order of remand against the Chinese person, and he by his own act in procuring a certificate of registration in conformity with the terms of the subsequently passed Registration Act cured the prior illegality of his residence. In the case of *Ex parte* Ow Guen, *supra*, the defendant was illegally within the United States and had he been arrested prior to obtaining a mercantile status he could have been deported, but by his own act he acquired a mercantile status prior to his arrest, and therefore could not then be deported as a laborer. In the case of *In re* Russomanno, *supra*, and Botis v. Davies, *supra*, the aliens had their illegal residence within the United States cured by the passage of time after their entry; in other words, the one year having elapsed in the first case, and two years having elapsed in the second case, the Government was debarred from de-

porting them upon the charge of illegally entering the country.

In the case of *U. S. v. Wong You*, *supra*, it is shown that the immigration authorities may only deport an alien for surreptitiously entering the country, providing their proceedings are instituted within three years after such clandestine entry. The Act contains its own limitation of three years, and if the parties so violating the Act are not proceeded against within that limitation, the Government cannot thereafter urge the illegality of their residence.

The cases relied upon by the Government in this matter before the Commissioner might with equal force be quoted in favor of the defendant.

The case of the *United States v. Chu Chee*, 93 Fed. Rep., p. 797, expressly holds and finds that the defendants were minor Chinese children who had been within the United States less than three years and they were ordered deported because they took the status of their father, who was a laundryman, the decision upon this point being:

“But it appears affirmatively that they were at that time the minor children of a Chinese laborer and that they are still minors. The status of the defendants, under the laws, was that of the father. The policy of the Exclusion Acts is to prohibit the entry into the United States of the entire class of the Chinese laborers as a class. * * *

“The defendants belonged to that class upon their arrival in this country and they so continued up to the time of their arrest;—and they

were not entitled to remain in the United States and should have been deported. Judgment reversed."

The case of *Mar Bing Guey v. the United States*, 97 Fed. Rep. 576, the second case relied upon by the Government, is singularly similar to the preceding case. The Chinese entered the United States as the minor son of an alleged merchant. Within three years of his landing he was arrested and charged with being illegally within the United States, the contention being that his father was not a merchant, as claimed, but a laborer. The Court found as follows:

"While the testimony shows that Mar Wing Joh has owned an interest in two mercantile establishments at El Paso, and still retains an interest in one of them, it is further shown, in the written stipulation of counsel, that he has not actively engaged in conducting the business, but that he has a third interest in a restaurant, of which he is the head cook, and that he has been cooking since the date of his certificate of residence, issued to him as a laborer in 1894. Tested by the plain provisions of the statute, he is not a merchant, but a laborer, and is entitled only to such rights and privileges as pertain to Chinese persons of his class."

And from page 580 of the same citation as follows:

"The Circuit Court of Appeals for the Ninth Circuit, in the case of *U. S. v. Chu Chee*, supra, held that the status of minor children, under the laws, was that of the father, and that 'the policy of the Exclusion Acts is to prohibit the entry into the United States of the entire class of Chinese laborers as a class'."

The District Attorney is in error in commenting in his brief filed before the Commissioner regarding the last two cases cited. In the case of *U. S. v. Chu Chee*, 93 Fed. 797, where he states that the two defendants were minors who were landed as children of a domiciled merchant, the decision in question shows that the two children did not pretend to be the sons of a merchant at all, but were in fact landed upon a certificate practically complying with the terms of Section 6 of the Act of May 6, 1882, as amended by the Act of July 5, 1884, as far as the contents of the certificate were concerned save that the certificate was not issued by the Chinese Government, but was issued by our consular representative, whose functions, under the law, were restricted to vising such a certificate when it had been properly issued by the Chinese Government. These two boys were not members of the exempt class, nor was the defendant in the case of *Mar Bing Guey v. U. S.*, 97 Fed. 576, but on the exact contrary, the Chinese persons in these cases were held by our own Circuit Court of Appeals to be minor children of laborers, and that legally they partook of the status of laborers and that they were therefore to be considered as laborers and not as persons entitled to admission into the United States, nor indeed as members of the favored or exempt classes. The District Attorney states that these boys might have gone to China and procured a Section 6 certificate and returned and been landed, but this assumption upon the District Attorney's part is

not borne out by the decisions, because the decisions are to the effect that the boys have the status of laborers and it therefore "admits of serious question" whether they were entitled to admission even had they presented Section 6 certificates.

The fourth and last reported case relied upon by the plaintiff leads us to a consideration of what is technically known as a "surreptitious entry." The case referred to, that of *Ex parte Li Dick*, 174 Fed. 674, was a habeas corpus proceeding to review the cause of detention by the immigration officials of Li Dick. It appears that Li Dick surreptitiously entered the United States on October 22, 1909, and he was immediately taken into custody by the immigration officials who procured a warrant of arrest from the Secretary of Commerce and Labor, in which it was charged that the defendant had entered without inspection; that is, surreptitiously. The trial amply established these facts and the Secretary ordered Li Dick deported. The Court was applied to and the contention raised that as the defendant was a Chinese person he would have to be proceeded against under the Chinese exclusion laws in a judicial deportation proceeding, and that, as he was held as a result of an executive deportation proceeding under the immigration law, he should be discharged, and the Court should further hear evidence as to his present mercantile status. In disposing of this matter the Court held that the defendant violated the immigration law by his surreptitious entry, and that he should be ordered

deported, and further, that if he had an exempt status under the Chinese exclusion laws, he should present it upon applying to the proper officials in asking re-admission into the United States. We agree with this decision, but distinguish it from the case at bar in the all important point that such a proceeding is here barred by the statute of limitations, as held in the recent case of *U. S. v. Wong You*, *supra*.

It being shown that deportation after a surreptitious entry must take place within three years, it naturally follows that if such a person is not deported within that time that the illegality of their residence is thereby cured, in this, that the Government, by reason of the lapse of time, is precluded from attacking their residence. This brings us irresistably to the conclusion that after three years have elapsed following a surreptitious entry, a legal residence then results.

In the case of *U. S. v. Wong Lung*, 103 Fed. Rep., the Court holds (Wheeler, District Judge) as follows (*Italics volunteered*):

“This case shows that the appellant has been a member of a firm of merchants dealing in groceries at Hartford, Conn., for 7 years, having \$1000 invested as his share of the capital. This entitled him to remain in the United States. *Lau Ow Bew v. U. S.*, 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340. The case also shows that he has lately visited China, and returned, but does not show the manner of his re-entry, nor any connection between his arrest for being unlawfully in the United States and

his return, *if that would be material as to his right to remain when actually and peaceably here.* Appellant discharged.”

While in the case of *U. S. v. Lee You Wing*, 208 Fed. Rep. 166, and which is a more recent case, the Court holds as follows (page 167):

“I think the fact that the defendant applied for such a certificate is entitled to considerable weight. He would probably not have dared to apply for such a certificate if he was a common laborer. The fact, too, that Mr. Wiley, although refusing to give it, took no action against the defendant for two years later, is still of greater significance. The government’s counsel in his brief states as an explanation of this delay that Chinese persons employed in mercantile pursuits and ostensibly having an interest in the firm in which they are working, even if they have no certificates, are not usually molested unless found actually engaged in laboring pursuits.

“But a man is either a merchant or not a merchant. If a merchant is unfortunate in business, and is obliged to become a laborer, that is no reason for deporting him because he has no certificate. He was not obliged to have a laborer’s certificate if he was a merchant.

Upon this record, I think that, if the defendant had continued to occupy the same relation to the firm of Wah Chong Lung and Co. that he occupied in 1910, he would not have been proceeded against; and, if that is so, the fact that he has since become a laborer does not warrant his deportation.”

This case just cited has since been considered and determined by the Circuit Court of Appeals for the Second Circuit, the case being *U. S. v. Lee You*

Wing, 211 Fed. 939, in which the Court said, Judge Rogers speaking:

“The Court below attached, and we think properly, some significance to the fact that, although he was refused a certificate on April 8, 1910, no steps were taken to have him deported until October 22, 1912, two years and six months afterwards. If he was unlawfully within the country in 1910, it was the duty of the officials of the government to have taken steps at that time to have him arrested and deported. The fact that during this long period of inaction the government made no move against him, implies a lack of confidence in its case. We are also inclined to attach some importance to the fact that the defendant voluntarily applied to the government officials in 1910 for a certificate to establish his status as a merchant. It is extremely doubtful whether he would have ventured to make such an application if he had entertained a doubt as to his ability to establish the facts necessary to sustain his application, with the danger of deportation threatening him if he brought the matter to the attention of the government and failed to secure the certificate.”

The Government, in its presentation of this matter, has not presented to the Court a single case in which a Chinese merchant or member of the exempt classes has been deported, but on the contrary, all of the cases presented by the Government under the Chinese Exclusion laws are concerning cases where the defendant then had the status of a laborer. The entire Chinese legislation is directed against Chinese labor, and therefore when a Chinese person works or is engaged as a laborer he commits a continuous

violation of the law, whether he has resided in this country for one year or for fifty years, and if he is without the certificate of registration he is liable to deportation. The point we advance, however, is that when the defendant is not a laborer and has not been a laborer admittedly now for upwards of 61½ years last past, he is not one who can be proceeded against as a laborer, but on the other hand, he is a merchant and a member of the privileged classes protected by the treaty between the United States and China. It is not pertinent to bring into a discussion of this feature of the case the deportation cases under the immigration law, because whatever is said with respect to those cases, it stands admitted that they are without force after the defendant has resided in this country for a period of three years following the surreptitious entry, and therefore the case of *Ex parte Li Dick*, *supra*, is inapplicable. The District Attorney contends that we cannot place a limitation upon the illegality of residence to prevent deportation of a merchant. We do not agree with him and call attention to the treaty between the United States and China, promulgated November 17, 1880, in Article II of which it is provided:

“Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.”

While it is also provided in Article I:

“This limitation or suspension shall be reasonable, and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations.”

It will be noted that this treaty accords to the defendant, as such merchant, all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation, and therefore, when the subsequent Immigration Act was passed, placing this limitation of three years within which a prosecution for a surreptitious entry is to be made, the defendant is certainly entitled to the benefit of it. On this point we desire to state that the guarantee of this Government contained in its treaty with China is not to be lightly disregarded, and in this connection we desire to cite the words of “Justice Harlan” in the case of *Chew Heong v. U. S.*, 112 U. S. 536, in which it is held:—

“For since the purpose avowed in the act was to faithfully execute the treaty, any interpretation of its provisions would be rejected which imputes to Congress an intention to disregard the plighted faith of the government, and, consequently, the court ought, if possible, to adopt that construction which recognized and saved rights secured by the treaty.”

It will be noted that the laborer is the only person authorized by treaty to be legislated against, and that the merchant is specifically exempted, and that all subsequent legislation should be construed and

interpreted in the light and in the spirit of these treaty stipulations. The very acts of Congress under which it is sought to deport this man were passed with the avowed purpose of enforcing these self-same treaty stipulations.

In the case of *U. S. v. Jamieson*, 185 Fed. Rep. 165, the Court said (page 166) :—

“It must be conceded in the first place that there is no statute absolutely excluding any Chinaman from the United States except a laborer. Act May 6, 1882, c. 126, 22 Stat. 58 (*U. S. Comp. St.* 1901, p. 1305), specifically refers to laborers only; and though the act of September 13, 1888, was unquestionably broadly comprehensive of all Chinese persons, sections 1 and 15 admittedly never went into effect, and it is very doubtful whether sections 2, 3 and 4 ever did either. Sections 5 to 14 inclusive, all of which have been from time to time re-enacted, are administrative sections, and do not exclude any new classes.”

A very important case which confirms the dictinction sought to be drawn is that of *Wong You v. U. S.*, 181 Fed. 313, which is a decision by the Circuit Court of Appeals for the Second Circuit, which is the same case which was afterwards decided by the Supreme Court of the United States, and is reported as *U. S. v. Wong You*, 223 U. S., *supra*. In determining this matter in the Supreme Court, that tribunal held that a Chinese laborer who surreptitiously entered the United States might be deported within a period of three years, under the provisions of the immigration law, notwithstanding that

such Chinese laborer was also deportable under the Chinese Exclusion or Restriction Acts of earlier date. The Supreme Court in deciding this case only decided that the Circuit Court of Appeals made a mistake in the rule of interpretation in holding that the General Immigration law should be read as silently excluding from its operation the cases which have been provided for by the special act. Apart from this the decision of the Circuit Court of Appeals was not adversely commented upon by the Supreme Court, and it may therefore be assumed to correctly set forth the principles involved. The opinion which was written by Circuit Judge Noyes is in part as follows:—

* * * “The Chinese exclusion acts deal with the removal of Chinese laborers unlawfully in this country and prescribe the procedure to be followed in deporting them. These statutes constitute comprehensive particular legislation with respect to that subject. It follows, then, under the rule of interpretation, that the immigration act—the later general statute—although in its terms including all aliens, applies only to those Chinese aliens who are not subject to removal by the particular Chinese enactments. * * *

It appears from the meager record that these petitioners are Chinese laborers and—if the government’s contentions be well founded—that they are aliens and subject to deportation in accordance with the provisions of the statutes relating to the Chinese. * * *

* * * And the immigration act—if the government chose to act under it—would supersede the Chinese statute, because it is evident that no alien Chinese laborer could come into

this country unless he enter surreptitiously and without inspection. But any such interpretation of the statutes would conflict with the rule which we have considered, under which both statutes do not apply to the same thing, but the later applies to those cases within its general language not within the provisions of the earlier; that is, as already pointed out, the Chinese statutes prescribe the procedure to be followed in removing alien Chinese laborers, while the immigration act states the procedure for the deportation of all other aliens unlawfully in this country including Chinese other than laborers. We think that these petitioners, being subject to removal according to the provisions of the Chinese exclusion laws, are not subject to removal in accordance with the procedure of the immigration act.

This conclusion makes no distinction in favor of the Chinese. Chinese laborers are excluded by the Chinese act. All other Chinese persons, not being excluded by that act, are subject to the provisions of the immigration act. A Chinese laborer, with or without a loathsome disease, cannot enter at all. The Chinese act governs the case. A Chinese merchant would not be excluded by that act, but would be excluded by the immigration act if he had a loathsome disease or other disability prescribed in such enactment. * * *

For these reasons, we hold that, as these petitioners appear to be subject to deportation in accordance with the enactments particularly relating to Chinese, they are not subject to removal under the provisions of the immigration act, and consequently are unlawfully held by process—either of arrest or deportation—issued under such act. If, however, proceedings should be instituted under the Chinese statutes, and it should be made to appear that the petitioners are not subject to deportation thereunder, this

opinion and the discharge of the petitioners in the present proceeding will not prejudice the institution of another proceeding under the immigration act."

In deciding this case the Supreme Court only reversed it upon the point that a laborer was also excludable under the General Immigration law. In the Supreme Court upon this point it was held, *U. S. v. Wong You* (*supra*), 223 U. S. 67:—

"* * * They were arrested in transitu and ordered by the Secretary of Commerce and Labor to be deported. Nos. 20, 21. But as it transpired in the evidence that they were laborers, the circuit court of appeals held that they could be dealt with only under the Chinese exclusion acts of earlier date. Those acts make it unlawful for any Chinese laborer to come from any foreign place into the United States, or, having so come, to remain there, and provide a different procedure for removing them. Hence it was concluded that such persons were tacitly excepted from the general provisions of the immigration act, although broad enough to include them, and although of later date."

Previously in this brief I have given the determination of the Supreme Court upon the question involved, which was to the effect that a Chinese laborer was likewise deportable under the General Immigration law; if he entered the country in violation thereof. This holding by the Supreme Court, however, does not impair the distinction drawn by the Circuit Court of Appeals, which is that the Chinese Exclusion and Restriction Acts only provide for the deportation of laborers. The Congress

of the United States was only authorized under the treaty with China to legislate against laborers, and it being conclusively shown, and in fact admitted that the defendant in this matter has had a mercantile status for six years and a half last past, and that he has had an official status since November of 1913, as hereinbefore set forth, it clearly follows that he cannot be deported as a laborer, as in point of fact he is not such. His status as a Chinese official exempts him entirely from the provisions of the Chinese Exclusion or Restriction Acts, while his status as a merchant exempts him from being deported as a laborer.

The administrative officers of the United States early applied to the courts for a ruling to determine that the rights of merchants were infringed upon by the acts of Congress herein complained of, in other words, to show that the acts had a broader significance than could possibly flow from the treaty, but the Supreme Court of the United States in *Tom Hong v. United States*, 193 U. S. 517-521, did not assent to this view, and their language in view of the facts involved in this case is indeed significant. The Court, Justice Day speaking, held:

“On the part of the government, it is contended that when a Chinese laborer is apprehended under this act and found without a certificate, and claiming to have been a merchant during the period of registration, he is subject to deportation unless it is affirmatively shown, to the satisfaction of the commissioner or court, that he was a merchant, as defined by the statute, during such period of registration.

“We do not find it necessary to determine this question in the cases now before us, for, in the opinion of the court, the testimony shows that the appellants were ‘merchants’ within the definition laid down by the law.”

THIRD.

HAS NOT THE COURT NOW JURISDICTION IN THIS MATTER TO EXAMINE INTO THE MERCANTILE STATUS OF THE DEFENDANT FOR THE YEAR PRIOR TO HIS DEPARTURE FROM THE UNITED STATES ON THE 9TH DAY OF JULY, 1907?

I now again advance the contention that the defendant was properly before the District Court, and the Government was precluded from raising the point of surreptitious entry by reason of the limitation contained in the immigration law, and probably also the general statute of limitations, and being before that Court, and the immigration officials having lost jurisdiction over the defendant by reason of the lapse of time, I feel should the District Court not having been satisfied to discharge the defendant upon either or both the official and mercantile status of the defendant acquired since his entry, that it would have been proper and incumbent upon the District Court to receive evidence showing that the defendant was a merchant for one year prior to his departure from the United States for China, the decision on the admissibility of this evidence being reserved and otherwise disposed of in the decision. Much the same situation is here presented as confronted the Supreme Court in the case of Chin Yow

v. U. S., 208 U. S. p. 8, wherein the Court held that the immigration officials had lost jurisdiction of the appellant by reason of the unfairness of the hearing accorded, and the Supreme Court found as follows:—

“But, on the other hand, as yet the petitioner has not established his right to enter the country. He is imprisoned only to prevent his entry, and an unconditional release would make the entry complete without the requisite proof. The courts must deal with the matter somehow, and there seems to be no way so convenient as a trial of the merits before the judge. If the petitioner proves his citizenship, a longer restraint would be illegal. If he fails, the order of deportation would remain in force.”

In the case at bar the immigration officials are deprived of jurisdiction by reason of the limitations above mentioned. In the habeas corpus case instituted upon behalf of this defendant to obtain his release from the immigration officials who had summarily taken him into custody for the purpose of sending him out of the country under the order of exclusion of 1908, the District Judge held against the jurisdiction of the immigration officers and in favor of the jurisdiction of the United States Commissioner before whom this matter originated,—and the District Court then, on appeal from the Commissioner, properly having jurisdiction over the defendant, and the Government having failed to produce any evidence showing or tending to show that the defendant is a laborer, that we were therefore entitled to show the mercantile status of the de-

fendant and claim the exemption which follows from it. It is contended by the defendant that much the same condition developed in this case as was presented in the case of *Ow Yang Dean v. U. S.*, decided by the Circuit Court of Appeals for this circuit, reported in 145 Fed. Rep. 801, in which a conspiracy existed to keep the defendant out of the United States, save, however, with this distinction that in the case of *Ow Yang Dean* the immigration officials landed the defendant, and thereafter repenting of their action, sought to have him deported in a judicial deportation proceeding, whereas in the present case the opposition of the immigration officials to the defendant was developed prior to and prevented an order of admission being entered in his case. The defendant in this respect feels that his present official and mercantile status is sufficient to show the legality of his residence in the United States, and should the Court hold otherwise, that the defendant should then in this present proceeding be permitted and entitled to show that he was a merchant for more than one year prior to his departure for China, and he would like to present evidence to that issue before the District Court.

In finally submitting this matter, I desire to state that the exemption from prosecution for surreptitiously entering the United States exists as to aliens after an elapse of three years from the date of such surreptitious entry, this being a right and

privilege which is accorded by the General Immigration law to all aliens who surreptitiously enter the United States, and article two of the treaty between the United States and China prescribing as it does that Chinese subjects, who are merchants, etc., shall have all the privileges, immunities and exemptions which are accorded to citizens and subjects of the most favored nation, and it therefore follows that this treaty being self-operative, and being the supreme law of the land, likewise imposes this exemption in favor of the privileged classes of the Chinese race. It is, indeed, difficult to understand the extreme hostility of the Government to the defendant in this case. Any Japanese or Hindu laborers, who are infinitely more objectionable to our people than Chinese officials and merchants, may surreptitiously enter this country, and after the elapse of three years live in perfect security from deportation on account of the method of their entry. Is it conceivable or possible that Congress intended that this exemption should be withheld from a Chinese official and merchant? Certainly not, because it would be a plain violation of the plighted faith of our Government, so well spoken of by Justice Harlan in the case of *Chew Heong v. U. S.*, *supra*. What is the offense of this defendant? He entered the United States 34 years ago. He has testified to this under oath. He procured a certificate of registration 23 years ago, and the certificate, or the copy issued in lieu thereof, is introduced in evidence. He was registered as a pawn broker, or a party

other than a laborer. He applied to go to China as a laborer, presenting his certificate as a condition precedent to said right, and submitted evidence that he had a wife living in this country, and also property interests here to the extent of over \$1000.00. This laborer's departure certificate was approved by the Deputy Collector of Customs for the Port of Los Angeles. His return certificate was denied at San Francisco, the contemplated port of departure, for the reason that the certificate described the holder as a person "other than a laborer," and gave his occupation as a pawnbroker. The then ruling of the department being that persons holding registration certificates describing them as persons "other than laborers" could not avail themselves of the right to depart as a laborer, and also that the department then construed that a pawnbroker was a merchant. The present rules of the Department of Labor upon this point are in conformity with the applicant's original claim, and any Chinese person having a certificate of registration, or any other evidence showing lawful entry into the United States, may depart as a laborer, the rule in question being rule No. 12 promulgated under the authority contained in the Chinese exclusion or restriction acts. It will therefore be seen that this defendant sought to comply with the law, and was only denied the return certificate by reason of the misinterpretation of the law by the Government authorities. Certainly these facts present a situation which show the Government's case to be entirely devoid of any

principle, equity, justice or fairness in its favor, and on the contrary it shows that the defendant was lawfully domiciled in the United States before he went to China; that he had the necessary property and family qualifications to go to China, and return as a laborer, and that he was dissuaded from this course by the Government officers, who held that because he was registered as a person "other than a laborer," that he could not depart as laborer. It is in evidence and affirmatively shown by the defendant that he has been a merchant ever since his surreptitious re-entry complained of, and in fact it is admitted and conceded by the Government that there is no violation of the spirit of the law, insofar as it prescribes to the entry of Chinese laborers in this country, but only the technical method of the re-entry of the defendant. From the appearance of this man it is apparent that he is not of the laboring class, and that he has not done any manual labor for a great many years. The duration of the defendant's absence from the United States, counting from his departure from Honolulu, through the Port of Honolulu, and return to the Port of Honolulu, is within the period of one year, during which laborers may absent themselves.

We feel that every principle of equity and justice in this matter should prompt the Court to make an order that the defendant being a Chinese official, that the statutes which are the source of the Court's authority in this matter, do not apply to the defendant, and that he therefore cannot be deported there-

under, and further that the defendant being now and having been for the past six years and a half a Chinese merchant (now seven and a half years), that he is exempt from the deportation feature of the Chinese Exclusion and Restriction acts, and cannot be deported as a laborer, and further that the defendant may not now be deported after an elapse of $6\frac{1}{2}$ years since his re-entry into the United States, without giving him an opportunity to submit evidence before the District Court that he was a merchant for a year prior to his departure from the United States for China, the immigration officials having lost jurisdiction of the defendant, and he having been properly before the District Court. It is respectfully urged that the judgment entered herein should be reversed and the appellant discharged from custody by reason of his official or mercantile status, or failing which, that the judgment should be reversed with instructions to permit the appellant to introduce evidence before the District Court of his mercantile status for the year prior to his departure for China.

Dated, San Francisco,
February 21, 1917.

Respectfully submitted,

GEO. A. MCGOWAN,

Attorney for Appellant.

No. 2858

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GIN DOCK SUE,

Appellant,

vs.

THE UNITED STATES OF
AMERICA,

Appellee.

BRIEF OF APPELLEE

Upon Appeal from the Southern Division of the United States
District Court for the Northern District of California,
First Division

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. United States Attorney,

Attorneys for Appellee.

Filed this.....day of March, 1917.

FRANK D. MONCKTON, Clerk,

By....., Deputy Clerk.

No. 2858.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GIN DOCK SUE,

Appellant,

vs.

THE UNITED STATES OF
AMERICA,

Appellee.

BRIEF OF APPELLEE

STATEMENT OF THE CASE.

The Government feels that little more is required of it to satisfy this Court that the order of deportation was correct than an orderly statement of the case.

The following facts are admitted by stipulation of counsel (Trans. pp. 50 to 52).

“It is hereby stipulated and agreed by and between the respective parties in the above-entitled cause that the ultimate facts as shown by the record of the Commissioner of Immigration at the port of San Francisco in said cause are as follows:

That on July 9, 1907, defendant departed from the United States for China;

That on July 14, 1908, the defendant returned to the United States from China, applying for admission under the name of YEUNG LUNG SOO, at the port of San Francisco, as a returning Chinese merchant of the firm of Dan Saw Hong Company, 306 Marchessault Street, Los Angeles, California;

That on August 26, 1908, defendant was denied admission into the United States by the Commissioner of Immigration for the port of San Francisco;

That on October 1, 1908, defendant's appeal from the excluding decision of the said Commissioner of Immigration was dismissed by the Secretary of Labor.

That on November 4, 1908, defendant's attorneys applied to the said Commissioner of Immigration for a reopening of the case, certain affidavits being filed in support of said application;

That on November 28, 1908, the defendant escaped from the custody of the Pacific Mail Steamship Company, at San Francisco, California, which Company had brought the defendant to the port of San Francisco, California, from China, on July 14, 1908, and which Company had held him in custody awaiting the determination of his application for admission into the United States.

That pursuant to the said application for a reopening of the case made by defendant's attorneys on November 4, 1908, said Commissioner of Immigration referred the matter of said application for reopening to the Immigration offi-

cials at Los Angeles, California, for investigation;

That on December 3, 1908, the said Commissioner of Immigration received a report from the said Immigration officials at Los Angeles, California, upon their investigation made pursuant to the said application for reopening;

That on December 8, 1908, the said Commissioner of Immigration made the following entry in the record of the matter of the said application of the defendant for admission into the United States;

‘San Francisco, Dec. 8, 1908.

This man escaped from the Pacific Mail Steamship Company, and is a fugitive—application for a rehearing denied.

H. H. NORTH,
Commissioner.’

And it is further stipulated and agreed by and between the respective parties in the above-entitled cause and their attorneys that the facts as herein set out are the ultimate facts as shown by said record of the Commissioner of Immigration, Port of San Francisco, and are to be considered by the United States Circuit Court of Appeals on the appeal taken herein.

JNO. W. PRESTON,
U. S. Attorney.

CASPER A. ORNBAUN,
Asst. U. S. Attorney.

GEO. A. MCGOWAN,
Attorney for Gin Dock Sue.”

The appellant was arrested on January 20, 1913, under a warrant issued by the United States Commissioner January 18, 1913, and has ever since been held by virtue of that warrant (pp. 5 and 6 Trans.).

At the hearing before the United States Commissioner, on March 27, 1914, K. Ow Yang testified as follows: (pp. 15 to 17 and 23-24 Trans.)

TESTIMONY OF K. OW YANG, FOR
DEFENDANT.

W. OW YANG, called for the defendant, sworn.

Mr. McGowan.—Q. You are the Chinese Consul general for the port and district of San Francisco?

A. Yes.

Q. Do you know the defendant in this matter, Chin Dock Sue?

A. I know him.

Q. What is his occupation?

A. He is secretary of the Ning Yung Association, and attached to the Chinese Consulate.

Q. He is a Chinese official?

A. Yes.

Q. How long has he been such?

A. I know him since he took it this last November.

The Commissioner.—Q. He is now attached to the consular service, is he?

A. Yes.

CROSS-EXAMINATION.

Mr. Hettman.—Q. By whom was he appointed as such official?

A. He was selected by the Ning Yung Association.

Q. Was he appointed in any way through the Chinese Government, itself?

A. Well, we have an advisory board of the Chinese consul and all the members of the different association assist our Chinese Consul in the work.

The Commissioner.—His appointment comes through what, some association here?

A. Yes.

Mr. Hettman.—Q. What is his official capacity, what is his title?

A. He is secretary of the Ning Yung Association, and he does work for the Chinese Consul at any time we have conferences of any kind.

Q. Did he get any papers or any certificate from the Chinese Government stating that he was a Chinese official?

A. Why, every time a new man is selected to come here, he gets his passport from the Minister in Washington to get in here.

Mr. McGowan.—Q. These men are all landed as Chinese officials at this port.

A. Yes.

Q. Right from the steamer?

A. Yes.

Q. Without any requirements being met as to the immigration law?

A. Yes, they are always taken as officials.

Mr. Hettman.—Q. His appointment was since November, 1913, is that it?

A. Yes.

Q. In November, 1913.

A. This last year.

Q. He never held any such official position prior to that time, to your knowledge?

A. No.

Q. Should this man have a certificate of any sort from the Chinese Government showing that he is such an official?

A. All the presidents of such association come from China, but the secretary of such association, they usually pick up a man who speaks English, for that, one who knows English; a man of that kind is generally selected in this country, because we want a man who knows English. The presidents always come from China.

Q. He has no credentials or anything from the Chinese Government?

A. No; but of course, in case he should come from China, the Chinese Government, the Minister in Washington, would issue him a passport.

Q. Then as I understand it, he is secretary for an association in San Francisco, who may do

some work for the Chinese Consul if he sees fit to have any work done?

A. Yes.

Mr. McGowan.—He is a member of the advisory board of the consul?

A. Yes.”

“TESTIMONY OF K. OW YANG, FOR DEFENDANT (RECALLED).

K. OW YANG, recalled for defendant.

Mr. McGowan.—Q. I show you a certificate and ask you what that is?

A. This is a passport given by the minister to one of the presidents of the Ning Yung Association to come here from China.

Q. That is issued by the Chinese Minister at Washington?

A. At Washington, yes.

The Commissioner.—That does not relate to this man.

Mr. McGowan.—That is Lee Yung Bing?

A. Yes.

The Commissioner.—Has he been a witness here?

Mr. McGowan.—No.

Q. He is at the present time the President of the Ning Yung Association?

A. Yes.

Q. Now, then, if this defendant were coming from China to be landed here as secretary of the Ning Yung Company, he would have a certificate issued to him just like that?

A. Yes.

Q. Describing him as the secretary, instead of the president?

A. Yes.

Q. Where the president of one of these companies is appointed here, does not come from China, does he have one of these issued to him?

A. No.

Mr. Hettman.—Did the Minister of China appoint the defendant here, as secretary of this association?

A. No.

Q. All this refers to is some other man whose passport you have here, signed by the minister of China, for a man by the name of Lee Yung Bing?

A. Yes.

Q. Has nothing to do with this defendant, here?

A. No.

Mr. McGowan.—Q. How are the presidents of this company selected?

A. They are selected by—

Mr. Hettman.—We object to this.

The Commissioner.—It is not very relevant,

but I want to hear all that bears upon the question.

Q. How are the presidents selected?

A. They are selected by the people of the association.

Q. And then the Chinese minister simply confirms the person that has been selected?

A. Yes, sanctions his selection."

Also before the Commissioner on said March 27, 1914, two white men, Newton G. Cohn and L. C. Tamm, (pp. 18 to 22 Trans.) and a Chinaman, Wong Lung Moon (p. 22 Trans.), testified in substance that this appellant, Gin Dock Sue, had been a merchant, member of the firm of Chung Lung Jan Company, 827 Grant Avenue, San Francisco, California, for about two years last past.

The appellant himself testified before the United States Commissioner (pp. 27 and 28 and 30 to 33 Trans.) upon other matters that are considered by the government as immaterial to this case, and produced a certificate of residence that he had been registered under the Chinese Exclusion Act.

The Commissioner then rendered the following opinion (pp. 8 to 10 Trans.), and ordered the appellant deported (pp. 11 to 13 Trans.):

"From the facts in this case it appears that the defendant Chin Dock, alias, etc., is a Chinese person and that he came to this port on board the steamship 'Korea', July 14, 1908, and after

due examination by the proper officers was denied a landing, thereupon and pending the return of said defendant to the port whence he came, said defendant escaped from detention.

It further appears from the evidence that said defendant is a merchant and has been such for the two years last past, and is also an officer in a local Chinese benevolent society, whose officers appear to be entitled to certain privileges as such in passing to and from the United States.

It is contended by the Government that the defendant is illegally in the United States and subject to deportation under the Chinese exclusion laws.

I am of the opinion that a Chinese person must submit to the exclusion laws when coming into the United States, and if he evades the law and his entry is illegal, he is subject to deportation. It is the province of the Department having the determination of the entry to first pass upon his right to come to the United States. Although he may have gained a status subsequent to his illegal entry that would entitle him to be and remain here, this cannot cure the illegal entry and his violation of the exclusion laws, subject him to the penalty of deportation. As was said in the case of *Ex Parte Li Dick*, 174 Fed. 674: 'Legally he is here in violation of law, and, so far as he is concerned or can be heard to say, he is found unlawfully here. He has no right to be here as he did not comply with the statutes and rules governing the entry of domiciled Chinese merchants, and until he has done that at the proper time and place his right to be here as such

merchant is suspended. He cannot now be allowed to plead or assert that right as a bar to deportation, even if he might assert it at the proper time and place and in a proper manner. x x x He did not have the right to come and go freely, and his case is not like that of a citizen of the United States arrested for having come in illegally on the supposition he was an alien.'

I do not think the defendant is an official of the Government of China within the meaning of the statutes so as to entitle him to absolute exemption from the provisions of the exclusion laws.

I am also of opinion that section 20 of the General Immigration Laws and Regulations, which fixes a limit of time for deportation, does not apply in this case.

FRANCIS KRULL,
United States Commissioner, Northern District
of California, at San Francisco."

At the hearing before the District Court there was introduced in evidence a paper, admittedly not issued to, or the property of the defendant, which reads as follows: (p. 46 Trans.)

“(Copy of Certificate:)

‘LEGATION OF CHINA, WASHINGTON.
No. 216.

To all to whom these presents shall come, Greeting:

Whereas Mr. Lee Yew Bong is about to proceed from his home in China to the port of San

Francisco, California, accompanied by his body servant, Lee Chock Yuen, for the purpose of filling the office of President of the Ning Yang Association, one of the Chinese Benevolent Associations, and Ex-Officio member of the Advisory Board of the Chinese Consulate General at the said port.

These are, therefore, to request all Customs and Immigration Officers whom it may concern, to permit the said Lee Yew Bong with his body-servant to pass freely and safely without let or hinderance, and, in case of need, to give him all friendly aid and protection.

Given under my hand and the seal of the Legation at the City of Washington, June 20, 1913.

CHANG YIN TANG,

The Minister of China.

All father

13486/6-5

S. F. 6-22-14

13794

and 10-14' "

The appellant's certificate of residence is set forth in the transcript (pp. 66 and 67), as is an application made by the appellant in 1903 for a laborer's return certificate (pp. 68 to 70 Trans.). In the Government's opinion, neither this certificate or the application are material in the case.

The opinion of the District Court affirming the Commissioner's order of deportation is as follows: (pp. 48 and 49 Trans.)

In July, 1908, Gin Dock Sue applied for admission at the port of San Francisco as a returning Chinese merchant. On August 26th, 1908, his application to land was denied, and on appeal the order denying his application was affirmed. He then applied for a rehearing, but on November 26th, 1908, and before such application was heard, he escaped from the detention quarters and has ever since been within the United States. On December 8th, 1908, his application for a rehearing was denied by the following order:

‘San Francisco, Dec. 8, 1908.

This man escaped from Pacific Mail Steamship dock and is a fugitive. Application for rehearing denied.’

Having been later found in this country he was arrested and after a hearing before the Commissioner was ordered deported. From the order of deportation an appeal was taken to this Court. It is urged here, as it was urged before the Commissioner, that respondent is a merchant, and that he is an attache of the Chinese Consular office in San Francisco. But whatever status he may have as an attache of the Consulate has been acquired since his escape from the Immigration officers in 1908. I do not think that that this method of entry into the country can be cured by thereafter becoming attached to a consular or other office. As to his mercantile

status, if it existed before his escape, that was a matter to be established regularly before the immigration officers at the time that he applied to enter. If their proceedings were unfair in the investigation of that question he might then have appealed to the courts. Instead of doing so he chose to enter the country by escaping from custody. If the status was acquired after such escape, he can no more be heard to urge it here as giving him a right to remain in this country than he can be heard to urge his connection with the Consulate. The law will not put such a premium upon surreptitious entries into the country as to permit one so entering to acquire a right to remain. The order of deportation is therefore affirmed.

M. T. DOOLING,
Judge."

October 8th, 1915.

The questions that the Government considers involved in this case are:

FIRST: Have the Courts, in the absence of unfair hearing or abuse of discretion on the part of the Immigration officials, authority to admit into this country under the Chinese exclusion laws a Chinese applicant for admission who has been duly denied landing and ordered deported by such officials, because of the escape of the Chinaman from their custody pending deportation?

SECOND: Is a Chinaman who came into the United States in violation of law—especially under the circumstances of this case—subject to depor-

tation by a United States Commissioner or Court under the Chinese exclusion laws by reason of his having subsequently taken up the occupation of one of the exempt or privileged classes, to wit: that of a merchant in this country?

THIRD: Assuming that while in this country as a result of such unlawful entry, said Chinaman, after his arrest under a United States Commissioner's warrant as being in the United States in violation of the Chinese exclusion laws, becomes an official of the Chinese Government in the capacity of an attache to a Chinese Consul General, is such Chinaman subject to deportation by a United States Commissioner or Court under the Chinese exclusion laws?

FOURTH: Does the record show that this appellant is in fact an official of the Chinese Government within the meaning of the Chinese Exclusion laws?

FIRST

Have the Courts, in the absence of unfair hearing or abuse of discretion on the part of the Immigration Officials, authority to admit into this country under the Chinese Exclusion Laws a Chinese applicant for admission who has been duly denied landing and ordered deported by such officials because of the escape of the Chinaman from their custody pending deportation?

It may well be contended that this Chinese person when recognized by the Immigration officials after his arrest under a United States Commissioner's warrant in 1913, and when he was again in their custody, should have been deported under the order of 1908 based upon the denial of his application for admission as a merchant; in other words, that such order of deportation remained in abeyance from the time of his escape in 1908 until his return to the custody of the Immigration officials in 1913. When the Immigration authorities had the appellant in their custody in 1913, and were about to deport him under the order of 1908, a petition for a writ of habeas corpus was filed in the District Court in his behalf. Before a hearing was had thereon, however, that Court granted a motion for his release on bail pending the habeas corpus proceeding, expressing the opinion that the appellant, by reason of his residence in this country for five years last past, was entitled to a trial before a United States Commissioner and to bail. Out of deference to this opinion of the Court, the Immigration officials relinquished the custody of the appellant without awaiting a hearing on the merits of the petition, and the deportation case before the United States Commissioner, which is now here on appeal, proceeded.

It is submitted that for this Court to order the discharge of the appellant would be tantamount to its landing in the United States a Chinese applicant for admission who is under a final order of depor-

tation made by the proper Immigration authorities, without the requisite finding, either that the hearing given by those authorities was unfair, or that they abused their discretion. It is, of course, unnecessary to support by the citation of authorities the fundamental principle that the Courts absolutely are without authority to interfere with the carrying out of such orders made by executive officers in the absence of unfairness or abuse of discretion by such officers.

SECOND

Is a Chinaman who came into the United States in violation of law—especially under the circumstances of this case—subject to deportation by a United States Commissioner or Court under the Chinese Exclusion Laws by reason of his having subsequently taken up the occupation of one of the exempt or privileged classes, to wit: That of a merchant in this country?

This question was clearly and positively settled by this Court in *United States vs. Chu Chee, et al*, 93 Fed. 797. On page 804 is the following:

“But it is contended on the part of the defendants that the status of Chinese aliens domiciled in the United States must be determined according to their status at the time of arrest and not at the time of entry, and that, upon being arrested, it was competent for them to show by affirmative proof that they were stu-

dents engaged in acquiring an education in our schools, and, being so engaged, they were not members of the prohibited class, and not subject to deportation. When, however, that domicile has been acquired contrary to and in violation of the laws of the United States, and when, as here, it is only through an unlawful entry into the United States that the Chinese persons secure a residence in this country, they cannot purge themselves of their offense by assuming the occupation of members of the privileged class, and establish their right to remain by proof of that character. The right of the defendants to land in this country on the claim of being students was dependent upon their producing to the collector of customs, at the port of their arrival, the certificate required by section 6 of the act of 1882, as amended; and to entitle them to remain here they must thereafter produce the same to the proper authorities whenever lawfully demanded."

The case now under consideration, if anything, is stronger for the Government than was that case because there Chu Chee, et al, had been regularly, though improperly landed by the Immigration authorities; while here, the appellant has never been landed by such officials, but, on the contrary, was ordered deported by them and escaped from custody before the order of deportation was executed. The appellant contends for an interpretation of the decision in that case quite different from that of the Government; but this Court knows best what it decided.

The following cases are also cited as involving the principle here contended for by the Government:

Mar Bing Juey vs. United States, 97 Fed. 576,

Ex Parte Li Dick, 174 Fed. 674,

Chin Fong vs. Backus, 213 Fed. 288 and 241 U. S. 1.

The Court will observe that none of the cases relied upon in the appellant's brief contain the question of unlawful entry as in the case at bar.

The argument of the appellant's attorney that the United States Commissioner was without authority to order this Chinaman's deportation because more than three years had elapsed since his unlawful entry, is to say the least startling. United States Commissioners and Courts have always had the power without limit as to time to order Chinese deported under the Chinese exclusion laws. This power was exclusively vested in them up until the passage of the Immigration Act of February 20, 1907, Section 21 of which vested the Secretary of Labor with concurrent power to expel Chinese in the country in violation of the Chinese exclusion laws but limited that authority given the Secretary of Labor to cases in which the Chinaman had entered the country within three years. Can it be said that because Congress limited as to time the concurrent jurisdiction of the Secretary of Labor, that it also impliedly limited as to time the jurisdiction

of the Commissioners and Courts? That this was never intended by Congress is especially apparent from the following provision of Section 43 of the said Immigration Act of February 20, 1907, as follows:

“Provided that this Act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent.
* * *.”

THIRD.

Assuming that while in this country as a result of such unlawful entry, said Chinaman, after his arrest under a United States Commissioner's warrant as being in the United States in violation of the Chinese Exclusion Laws, becomes an official of the Chinese Government in the capacity of an Attache to a Chinese Consul General, is such Chinaman subject to deportation by a United States Commissioner or Court under the Chinese Exclusion Laws?

It is submitted that a Chinese without any credentials whatsoever from the Chinese Government, or even from the Chinese Minister in this country, is in no better position to resist deportation because of his unlawful entry, he having secured that position after his arrest upon a charge of being in the United States in violation of law because of his unlawful entry, than would be a Chinaman who had followed the calling of a merchant after his unlaw-

ful entry. The claim of such a Chinaman to the status of an official is at least questionable.

FOURTH.

Does the record show that this appellant is in fact an official of the Chinese Government within the meaning of the Chinese exclusion laws?

The evidence upon which the question of official status is based is the testimony of Mr. K. Ow Yang, former Chinese Consul-General at San Francisco, hereinbefore set forth; and also the passport issued by the Chinese Minister at Washington to Mr. Lee Yew Bong when the latter came to the United States from China as the President of the Ning Young Association, one of the Chinese benevolent societies comprising what is commonly known as the six companies. The Ning Young Association is the organization of which the appellant claims to be secretary. Appellant's counsel has injected facts into his brief that do not appear in the evidence, and therefore it is not impossible that the government may take the same liberty.

It seems scarcely necessary to do more than invite the court to read the evidence just indicated to convince it that the claim that this appellant is an official of the Chinese Government in any proper sense is ridiculous. In the first place, even the presidents of these benevolent associations are not appointed by the Chinese Government. When they

come from China they are simply possessed of a passport such as the humblest private citizens of nations are provided when they go abroad. It is safe to say that neither the official records of the Government in China nor of our government make the slightest mention, either of the president of the Ning Young Association or of this appellant, except perhaps of the former in connection with his having been issued, like many other private citizens, a passport. If there were any official record that would have shown that this appellant was known in any sense as an official of the Chinese Government, a copy of that record would certainly have been produced. Again, it is significant that that government has not concerned itself in the least over this alleged indignity suffered by the appellant. It is true that the Consul-General has appeared and told how the appellant was the secretary of a local Chinese benevolent association and was elected such solely by the members of that body; how he and the members of the different associations assist him (Consul-General) in his work; and how "he does work for the Chinese Consul at any time we have conferences of any kind." It is the duty of the Chinese Consul-General to assist even the humblest of his countrymen here. He frequently interests himself in behalf of Chinese subjects of all classes whose cases are before the Immigration officials.

The situation is analogous to this: Suppose within the District of an American Consul in a

foreign country there should be American residents from various sections of this country; suppose the residents from each section should form an association to look after the interests of its members; even to the extent of settling difficulties that may arise between individual members; suppose that the American Consul, a part of whose duty it would be to interest himself in the welfare of all Americans in his district, should by custom meet with the officers of these associations to consider with them matters relating to their welfare, and that they should be known as his advisory board. Is it conceivable that these members of this advisory board would be officials of the United States Government?

Great stress is laid upon the fact that the *presidents* of these benevolent associations on coming from China have been landed as officials by the Immigration authorities. The question whether they are really officials within the meaning of the law has on occasions been seriously questioned and considered in the Department of Labor, and, without deciding the question, the conclusion has been reached that it would be good policy, considering the comity between the nations and pleasant commercial relations, to let the custom stand and give the law even a broader interpretation than its terms justify.

In considering this point, sight should not be lost of the fact that this deportation proceeding was instituted against the appellant in January, 1913,

and that he did not acquire his so-called official status until November, 1913.

Respectfully submitted,

JOHN W. PRESTON,
United States Attorney,

CASPER A. ORNBAUN,
Asst. U. S. Attorney.
Attorneys for Appellee.

No. 2858

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit

GIN DOCK SUE,

Defendant and Appellant,

vs.

THE UNITED STATES OF AMERICA,

Plaintiff and Appellee.

REPLY BRIEF FOR APPELLANT

GEO. A. MCGOWAN,
Attorney for Appellant.
Bank of Italy Building,
San Francisco, California.

Filed this.....day of March, 1917.
Frank D. Monckton, Clerk.

By.....Deputy Clerk.

No. 2858.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

GIN DOCK SUE,

Defendant and Appellant,

vs.

THE UNITED STATES OF AMERICA,

Plaintiff and Appellee.

REPLY BRIEF FOR APPELLANT.

In the brief upon behalf of the Appellee (P. 19) reference is made to the case of *Chin Fong vs. Backus*, 241 U. S. 1, as upholding the contention of the Government that a legal residence cannot be founded upon a long prior irregular entry. We do not so construe that decision. In the *Chin Fong* case the appeal was taken direct to the Supreme Court upon the theory that the construction of a treaty was involved and this the jurisdictional point being adversely decided, the court, speaking through Mr. Justice McKenna, did not find it necessary to decide the other points involved. The Court said:

“No provision of the treaty is cited from which the contention is an applicable deduction, nor are we disposed to quote and comment on the entire treaty in answer to the contention. See 22 Stat. at L 826; also *Lau Ow Bew vs. United States*, *supra*. The ‘merchant’ defined by it does not include petitioner. It was the definition of the status acquired in China, not acquired in the

United States, and, having been acquired in China, gave access to the United States, and after access freedom of movement as citizens of the most favored nations. And this privilege was given as well to Chinese laborers then (1880) in the United States. We think, therefore, there is no substantial merit in the contention that the case involves the construction of a treaty, and that the rights of petitioner can rest only upon the statutes regulating Chinese Immigration. So concluding we are not called upon to decide or express opinion whether petitioner's original entry into the United States and his subsequent residence therein were illegal, and whether he could acquire by either a status which the immigration officers were without power to disregard.

Dismissed."

In our opening brief we advanced the claim that the prosecution of this deportation proceeding against this defendant, he having been a merchant for seven years and a half, and an official since November 1913, was barred by the Statute of Limitations. On page 22 of the brief we referred to the limitation contained in the General Immigration Law, and on page 40 we referred to the general statute of Limitations. Upon the argument this last mentioned contention was elaborated upon, and permission granted to file a reply brief thereon.

A deportation proceeding has been held to be not a criminal proceeding. Sec. 4 of the Act of May 5,

1892 (27 Stat., p. 25.) entitled "AN ACT TO prohibit the coming of Chinese persons into the United States" provides as follows:

"That any such Chinese person or person of Chinese descent convicted and adjudged to be not lawfully entitled to be or remain in the United States shall be imprisoned at hard labor for a period of not exceeding one year and thereafter removed from the United States as hereinbefore provided."

Sec. 6 of said Act provided for the registration of Chinese laborers.

Two Chinese deportation cases arising under the provisions of these sections were carried to the Supreme Court of the United States, and it was there held that such a deportation case was not a criminal proceeding, and in the latter of the two cases that the provision of this section which imposed a punishment, was void.

Fong Yue Ting vs. U. S. 149 U. S. 730.

Wong Wing vs. U. S. 163 U. S. 228.

The ruling in the above entitled cases amply covers these Chinese deportation proceedings, and stamps them as not criminal proceedings but civil proceedings. The Revised Statutes of the United States have made the laws of the various states the rules of decision in the United States Courts situate within the respective states. Section 721 of the Revised Statutes provides as follows:

"The laws of the several states, except where

the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.”

Under the provisions of Section 721, of the Revised Statutes of the United States, we advance the contention that when a deportation proceeding against a Chinese person is brought within the limits of the State of California, that the Statute of Limitations provided by the laws of the State of California apply, govern and control the decision of the United States Courts. Before giving the citations upon this point, we desire to explain this observation by the statement that we do not refer to a case where the defendant is a laborer at the time of his arrest, for, as set forth in our opening brief, we concede that to be a continuous violation of the statute, but we do mean it to apply to a case in which the defendant is not a laborer at the time of his arrest, and who has not been such a laborer in excess of the period covered by the Statute of limitations, thus enabling such a defendant to claim the exemption therein sought. At the outset, it is of course, maintained, that the General Immigration Law contains its own limitations, that such a deportation proceeding must be commenced within three years after the irregular entry. The Chinese Exclusion and Restriction Acts are silent as to the time within which such a person may be arrested and deported.

The Statute of Limitations provided in the Code

of Civil Procedure of the State of California which we contend are applicable to this matter are contained in the following sections:

“C. C. P. of Cal. Section 335. *Periods of Limitation prescribed.* “The periods prescribed for the commencement of actions other than for the recovery of real property are as follows.” C. C. P. of Cal., Section 338. “Within three years.

“1. An action upon a liability created by statute, other than a penalty of forfeiture.” C. C. P. of Cal., Section 340. “Within one year.

“1. An action upon a statute for a penalty or forfeiture, when the action is given to an individual, or to an individual and the state except when the statute imposing it prescribes a different limitation.”

“2. An action upon a statute or upon an undertaking in a criminal action, for a forfeiture or penalty to the people of this state.”

“Section 345: *Actions by the people subject to the limitations of this chapter:* “The limitations prescribed in this chapter apply in actions brought in the name of the state or for the benefit of the state, in the same manner as to actions by private parties, except that actions for the recovery of money due on account of the presence of patients at the state hospitals may be commenced at any time within three years after the accrual of the same.”

It is obvious that if the foregoing provisions limiting the time within which such actions can be com-

menced are applicable to proceedings in the United States Courts, that this must dispose of the issue in favor of the defendant. That must therefore be our next inquiry. In the case of *Campbell vs. City of Haverhill*, 155 U. S. 610, the court held, Mr. Justice Brown speaking:

“The argument in favor of the applicability of state statutes is based upon Rev. St. 721, providing that ‘the laws of the several states except,’ etc. ‘shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply.’ That this section embraces the statutes of limitations of the several states has been decided by this court in a large number of cases, which are collated in its opinion *Bauserman vs. Blunt*, 147 U. S. 647, 13 Sup. Ct. 466. To the same effect are the later cases of *Metcalf vs. Watertown*, 153 U. S. 671, 14 Sup. Ct. 947, and *Balkam vs. Iron Co.*, 154 U. S. 177, 14 Sup. Ct. 1010. Indeed, to no class of state legislation has the above provision been more steadfastly and consistently applied than to statutes prescribing the time within which actions shall be brought within its jurisdiction.

“It is insisted, however, that, by the express terms of section 721, the laws of the several states should be enforced only ‘in cases where they apply,’ and that they have no application to causes of action created by congressional legislation and enforceable only in the Federal courts.” * *

“But as no such ^{no} discrimination is attempted by this statute, and ^{no} claim made that the time was unreasonably limited, the point need not be further noticed.” * * * * *

“Unless this be the law, we have the anomaly of a distinct class of actions subject to no limitation whatever,—a class of privileged plaintiffs, who, in this particular, are outside the pale of the law, and subject to no limitation of time in which they may institute their actions. The result is that users of patented articles, perhaps innocent of any wrong intention, may be fretted by actions brought against them after all their witnesses are dead, and perhaps after all memory of the transaction is lost to them. This cannot have been within the contemplation of the legislative power. As was said by Chief Justice Marshall in *Adams vs. Woods*, 2 Cranch, 336 342, of a similar statute: ‘This would be utterly repugnant to the genius of our laws. In a country within which not even treason can be prosecuted after the lapse of three years, it can scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.’ Whatever prejudice there may have been in ancient times against statutes of limitations, it is a cardinal principle of modern law and of this court that they are to be treated as statutes of repose, and are not to be construed so as to defeat their obvious intent to secure the prompt enforcement of claims during the lives of the

witnesses, and when their recollection may be presumed to be still unimpaired. As was said of the statute of limitations by Mr. Justice Story, (*Bell vs. Morrison* 1 Pet. 351, 360): ‘It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt, from lapse of time, but to afford security from stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of the witnesses.’ This language is peculiarly applicable to patent cases, in which questions of anticipation frequently rest in oral testimony only, and are required to be proved to the satisfaction of the court by something more than a mere preponderance of evidence.”

* * * * * The truth is that statutes of limitation affect the remedy only and do not impair the right, and that the settled policy of congress has been to permit rights created by its statutes to be enforced in the manner and subject to the limitations prescribed by the laws of the several states.” * * * * * “In fine, we are of the opinion that the statute of limitations was a good plea to this action, and the judgment of the circuit court is therefore affirmed.”

A consideration of the foregoing decision leaves us with two points in section 721 of the Revised Statutes, to be considered. The first is with respect to the treaty obligations, and the second is *in cases where they apply.*” With respect to the treaty obli-

gations attention only need be directed to the treaty between the United States and China, concerning immigration, of November 17, 1880, and this may be covered by reciting the first three articles of the treaty:

Article 1. "Whenever in the opinion of the Government of the United States the coming of Chinese laborers to the United States, or their residence therein, affects or threatens to affect the interests of that country, or to endanger the good order of the said country, or of any locality within the territory thereof, the Government of China agrees that the Government of the United States may regulate, limit or suspend such coming or residence, but may not absolutely prohibit it. The limitation or suspension shall be reasonable, and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations. Legislation taken in regard to Chinese laborers will be of such a character only as is necessary to enforce the regulation, limitation, or suspension of immigration, and immigrants shall not be subject to personal maltreatment or abuse."

Article 2. "Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded

all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nations.”

Article 3. “If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill treatment at the hands of any other persons, the Government of the United States will exert all its power to devise measures for their protection and to secure to them the same rights, privileges, immunities and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty.”

It is apparent from the above that legislation is only authorized against Chinese laborers, and that all other classes are not to be the subject of any limitation. Justice Harlan in the case of *Chew Heong vs. United States* 112 U. S. 536, states as follows:

“For since the purpose avowed in the act was to faithfully execute the treaty, any interpretation of its provisions should be rejected which imputes to Congress an intention to disregard the plighted faith of the government, and, consequently, the court ought, if possible, to adopt that construction which recognized and saved rights secured by the treaty.”

It is apparent from this citation to the treaty, and the decision of the Supreme Court of the United States that there is nothing in the treaty obligations

of the United States which precludes the application of Section 721 of the Revised Statutes.

The only remaining point to be touched upon is that phrase in the Statutes "*in places where they apply.*" It has always been a part and parcel of the Immigration Laws of the United States that a person who surreptitiously enters our territory or effects an entrance in an irregular way, must be deported within a specified time. The General Immigration Laws of the United States have always contained such a limitation. On pages 22, 23 and 24 of our Opening Brief in this matter, we set forth three different cases, each exemplifying the law, where the period of limitation therein mentioned was respectively one, two and finally three years. The limitation contained in the present Immigration Laws provides that a certain class of disreputable aliens may be deported at any time when they are found in the United States, following a prescribed occupation, that is,—prostitution, or anything which is kindred thereto. The limitation of three years, however, does apply in the cases of surreptitious or irregular entry, or entry without inspection. Hence we are brought face to face with the conclusion that there is nothing in the idea of a limitation for merely an irregular entry which in itself is at all inapplicable or repugnant to the phrase "*in places where they apply.*" It is shown to have been a fixed policy of the Immigration Laws, to have a limitation placed upon the time within which a person who enters in an irregular manner, may thereafter be deported. The theory of this un-

doubtedly is that if such an alien enters and does not render himself obnoxious, and becomes absorbed in the mass of our population and remains so absorbed for the period of the limitation, that he cannot be then considered as a person so objectional to life within the United States, as to be thereafter deported. The Chinese exclusion and restriction acts were aimed at Chinese laborers, and not members of the exempt classes. This defendant and appellant is a merchant and is a Chinese official, as shown by the record in this case, and it is repugnant to American ideas of the equities of the situation that he should be forever hounded, because of the irregular manner of his re-entry into the United States. The defendant and appellant was, by occupation, a cigar vendor, and owned a lot of property among which was an interest in a vegetable garden outside of Los Angeles. He accordingly, applied for a Laborer's departure certificate, qualifying therefore as to the necessary amount of property in this country, and the fact that he had a wife living here, and also filed his certificate of residence. His certificate of residence described him as a *person other than a laborer*, giving his occupation as a *pawn broker*, and according to the technical ideas of the person in charge of the administration of these laws, they held that one registered as a *person other than a laborer* could not avail himself of the privileges of the ordinary laborer, hence this appellant was refused the right to go to China by classing himself a laborer. The Department officials subsequently changed their ideas, and now he

would be permitted to make such a trip as a laborer. The defendant and appellant accordingly, to make his trip to China, asserted a mercantile status, claiming an interest in a Chinese drug store. Upon his return his application was denied, claiming that he was not technically a merchant, and that he should have made the trip as a laborer, which is the very thing which he originally tried to do. He was not absent from the territory of the United States for a greater period of time than the law would have permitted him if he had a laborer's departure certificate.

In finally submitting this matter to the consideration of this court, we feel that this defendant and appellant having been a Chinese merchant ever since his irregular re-entry into the United States, and having been a Chinese official, as shown in the testimony, that he is entirely exempt from the rigorous provisions of the Chinese exclusion or restriction acts, which are only authorized against Chinese laborers. There is no language more apt or more fitting in which to submit this matter to the court, than the language of the late Justice Field in the case of *Wong Wing vs. United States*, 163, U. S. 228; 16 Sup. Ct. 977:

“The contention that persons within the territorial jurisdiction of this republic might be beyond the protection of the law was heard with pain on the argument at the bar,—in face of the great constitutional amendment which declares that no state shall deny to any person within its jurisdiction the equal protection of the laws.

Far nobler was the boast of the great French cardinal who exercised power in the public affairs of France for years, that never in all his time did he deny justice to any one. 'For fifteen years,' such were his words, 'while in these hands dwelt empire, the humblest craftsman, the obscurest vassal, the very leper shrinking from the sun, though loathed by charity, might ask for justice.'

It is to be hoped that the poor chinaman, now before us seeking relief from cruel oppression, will not find their appeal to our public institutions and laws a vain and idle proceeding."

Respectfully submitted,

GEORGE A. McGOWAN,

Attorney for Defendant and
Appellant.

No. 2858

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

GIN DOCK SUE,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

Appellant's Petition for a
Rehearing

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Filed this.....day of October, 1917.

Frank D. Monckton, Clerk.

ByDeputy Clerk.

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*To the Honorable William B. Gilbert, Presiding
Judge, and the Associate Judges of the United
States Circuit Court of Appeals for the Ninth
Circuit:*

This Appellant presents this his petition for a rehearing, based upon what he believes to be a misconception of fact upon one point, and a request for

consideration upon an additional point of law involved in the issues of this case.

The misconception upon the question of fact to which reference is made, has to do with the official standing of this Appellant as an attache of the Chinese Consulate for the port and district of San Francisco. The concluding part of the Court's opinion in dealing with the official standing of this appellant states as follows:

“By reason of his being such an officer, the Chinese Consul avails himself of his assistance in doing consular work, but we infer that he is not a regular attendant of the consul, any more than are the secretaries of all the six associations of Chinese residents in this country.”

A little historical reference to the great legal principle underlying this point may not be amiss. The Government of the United States maintains a court known as the “United States Court for China” at Shanghai, China, which court is within the appellate jurisdiction of this Honorable Court. The function of this court is to have jurisdiction of all matters affecting citizens of our country within China. In other words, the Government of the United States conceived the principle that it desired the rights of its own citizens protected by its own courts even within the territorial jurisdiction of the Empire of China. The Chinese government consented to this arrangement, which it might be noted was similar to the foreign courts which were established through

the Turkish Empire during the years ante-dating the present European war. The Chinese government, with the tacit consent of the political branch of our own government, has all these years maintained in San Francisco, these consolidated six companies, which in their collective capacity, through the officers of the company, sit as a court of arbitration, settling disputes and differences arising among the Chinese people. The members of this court or commission, for such it would seem to be, are respectively the officers of the various six companies. The deliberations of this body are under the direct general supervision of the Chinese Consulate. This body is, of course, also commercial in character, and it has many duties and functions to perform which appertain to the work of the Consulate in the way of promoting the commercial interests and intercourse of the Chinese people with their own country. All of this is done under the supervision of the Chinese Consulate, and all of these officers are attached to the Chinese Consulate, and form the membership of his advisory council. We, as a government, have obtained from China the concrete right to maintain a fully recognized court of justice within the Chinese Empire, and in return we have permitted the maintenance of these courts of arbitration among the Chinese here in our midst. The opinion of the Court in this matter upon this head seems to consider the post of consul as that having to do with diplomatic negotiations or negotiations which directly affect the Chinese government politically in its relation with our government,

but it is respectfully submitted that this consideration is to the exclusion of by far the greater duties of all consular representatives. The consular representatives are really mainly commercial agents, who make their commercial reports, setting forth information about the trade reports and possibilities for increasing both the domestic and foreign trade of their country, and also generally looking after the interests of their countrymen. In the present case the duties of this advisory board fall directly within the purview of these governmental functions. To say that this condition is not recognized by the Chinese government would seem to be a conclusion directly in the face of the evidence. The testimony of the Chinese Consul is to the effect that the Six Companies is formed and made up upon the basis of political conditions existing in China at the present time. That the presidents of these companies are elected in China and come to this country as Chinese bearing the certificate of the Chinese Minister accredited to the United States in recognition of their election. The secretaries of these companies are also elected according to the political subdivisions in China. They are recognized by the evidence of their personal identity, which is furnished by the recognition of their official position by the Chinese Consul General himself. If the secretary should be in China at the time of his election he would receive his letter of credentials from the Chinese Minister just as do the Presidents of these various companies, and on the other hand should the president of a company be elected here, he would receive no cer-

tificate of identity from the Chinese Minister at Washington, but his official status would be evidenced by the official recognition of the Chinese Consul General of this port, of his official status as the president of this company. It certainly is an unjust criterion to say that these officers only render services if they happen to be called upon by the Chinese Consulate, because in point of fact the Chinese Six Companies, at which these officers have to attend as an advisory council, hold various meetings every week wherein are determined matters of political and commercial importance, and where the welfare of the Chinese of this country is, as a political issue, taken up and discussed. The political branch of the Government of the United States has recognized for many, many years the existence of these conditions, and whether treated merely as a "sop" or as a political recognition of more substantial value to China in return for the more substantial privilege of the territorial United States Court in China, the fact nevertheless remains undisputed that the right of the members of this advisory board of the Consulate to be considered and classed as Consular attaches is one firmly fixed and time honored in its observance by the political branch of the Government of the United States.

Indeed, the position of this appellant instead of being a superficial, honorary one, in which he only "might" be called upon to render services, is a very substantial and highly remunerative one, in which almost the entire time of the appellant is consumed in the discharge of his official duties.

The testimony of the Chinese Consul General is to the effect that were this appellant in China and coming to this country, the official certificate would be issued to him by the Chinese Minister, and he would accordingly be at once admitted into the United States as a person falling without the purview of the General Immigration Laws or the Chinese Exclusion Laws of the United States of America. This is very explicitly and clearly the testimony of the Chinese Consul General. The law does not require the performance of useless or unnecessary acts, and it must be obvious that if this appellant, a recognized official of the Chinese government, to wit: an attache of the local consul, were deported, he would at once be armed with the certificate of the Chinese Minister, and be entitled to re-admission, and certainly the law does not require the observance of idle conditions, and would not seek to impose upon the Government of the Republic of China with which government we are upon such terms of international comity.

All laws should receive a sensible construction, and where a person is shown to be entitled to re-admission into the United States, it would be an idle act to proceed with the deportation, to the end that the party deported would only immediately return and be entitled to re-admission. This court amply determined this proposition in the case of Tsoi Sin vs. United States, 116 Fed. 920, wherein the court said:

“Conceding that, by applying a literal language of the statute, it might be held that she should be deported, yet is it not evident that such a construction would necessarily lead to absurd results without any benefit to the United States? The object and intent of the law was to deport Chinese not entitled to remain. If appellant was to be deported, she would have the unquestioned right to immediately return, and would be entitled to land, and remain in this country, upon the sole ground that she is the lawful wife of an American citizen.”

Further citations and authorities upon this point following the brief extract given above, are worthy of the most earnest perusal. Judge Dooling more recently had occasion to consider this same point, and gave recognition to it in *ex parte Chan Shee*, 236 Fed. 579, wherein the court held:

“The demurrer to the petition must, therefore, be overruled. I have less hesitancy in entering this order, because I am convinced that, if applicant were at once deported under the original order, she could return upon the same boat with full right to enter as an unquestionable wife of a domiciled merchant. The facts as stated herein are gathered from the petition itself, and the records of the Immigration Department, which, by stipulation, have been made a part thereof.”

With respect to the legal significance of the political status of this appellant, we feel that the political branch of this Government, having placed the stamp of its approval upon the official status of attaches of the Chinese Consulate, that the question, being a political one, then assumes a decided aspect. This political recognition is always through the medium of the State Department. The Chinese Minister notifies the State Department that such a President or Secretary, if such a case arose, was arriving upon a certain steamer, and asks that extension of the usual courtesies to one of his official position. This in turn is passed from the State Department to the Department of Labor, and the Consul attache is immediately landed from the steamer as being a person entirely exempt from the operation of the General Immigration Laws and the Chinese Exclusion and Restriction Acts. We feel that the political branch of our Government having placed the stamp of its approval and its official recognition upon these officials as Consular attaches, that that is an end to the matter, and that courts are not at liberty to decide to the contrary. This certainly is the well settled law in both England and our own country. 2 Camp. R. 61; 15 East 81; 3 Wheaton 634; 4 Wheaton 52; 7 Wheaton 283.

SECOND:

The question of law upon which appellant feels that this Honorable Court might grant further consideration, has to do with the assumption by the

court that the fairness of the hearing before the Immigration authorities in the application of this appellant to re-enter the United States was fair. Exactly, upon the contrary, it is contended that the hearing and the action of the Immigration authorities was manifestly unfair, and their action so prejudicial, that this court would be warranted in receiving evidence upon the status of this appellant. Gin Dock Sue was a Chinese person who had procured a certificate of registration in which he was described as a person other than a laborer, to wit: a pawn broker. He applied to go to China as a laborer. He had the necessary property and family qualifications (either of which would have been sufficient) to enable him to make such a temporary trip to China. His credentials were approved by the Collector of Customs for the Los Angeles district. When he came to San Francisco to take his departure, the Collector of Customs for this district refused to approve his credentials, and refused to issue to him a laborer's return certificate. This refusal was based upon the mistaken interpretation of law that because Gin Dock Sue was registered as a pawn broker, and that a pawn broker was then classed by the Customs authorities and the Treasury Department as a merchant, that he could not avail himself of the rights of the more lowly laborer. When the appellant then attempted to depart upon the basis of his being a merchant, and he does so depart, he finds upon his return to this country that he is denied because he is a laborer. Here is a case of a man who has lived in this country for thirty-five years

and has always observed its laws. He finds himself now before the Court asking its protection. It certainly is not his fault that the customs officials and the Treasury Department officers who then had charge of the enforcement of the Chinese Exclusion laws misinterpreted the law, and refused him a laborer's certificate, upon a set of facts which would, to say the least, warrant the issuance of a laborer's certificate to him. We do not feel that it is a proper exercise of judicial consideration for the court to limit its consideration upon this point to merely the record of the immigration officials upon the mercantile status of this appellant, but that considering the broad equities of this case, there should be embraced within the field of judicial consideration, those prejudicial facts ante-dating the filing of the merchant's application which really caused the filing of a mercantile paper. Unquestionable under the law *Gin Dock Sue* should have been permitted to go to China on a laborer's certificate, and he was eligible to be landed as such upon his return. That is the ruling at the present time. The fact that he was not permitted to go was clearly the fault of the Government officials of the United States, and hence the responsibility in the premises should rest upon the Government, and not upon this appellant. He tried to comply with the law and the error was the error of the Government. They would not let him go as a laborer because they said he was a merchant, and then when he tried and did go as a merchant, they would not land him upon his return, because they said he is a laborer. He had the necessary qualifi-

cations to go and return as a laborer, to wit: his certificate of residence, and was doubly qualified through property interests and a family in this country. In view of these facts we feel that it clearly appears that the executive officers of the government entrusted with the enforcement of the Chinese Exclusion Laws, made a very clear mistake in interpreting the law, and that this appellant should not be held accountable therefor.

The court in its opinion in this matter treats the adverse conclusion of the Commissioner of Immigration on the application of this appellant to re-enter the United States with all the solemnity and form of a decree or judgment of a court of record, nay, even higher, because like the law of the Medes and Persians it stands immovable and unchanged through all time, even defying the statute of limitations, which outlaw civil judgments. The court in its opinion virtually finds that if the defendant had surreptitiously entered this country, or entered without inspection, that his point of law would be well taken, but because he escaped after his case had been denied, but while the petition for re-hearing was still undetermined, that he is in a worse position than one who enters in violation of the law. We do not assent to this view, and we feel that it is a reading of something into the statute which Congress has not placed there. In both acts in question Congress states that those who enter in violation of the law, or those who are found in this country in violation of the law, shall be deported in a certain way. There is nothing contained in either

act which would go to the extent of holding that Gin Dock Sue could have been summarily taken and deported without any warrant or process or authority for such action. In fact, when the Commissioner of Immigration sought to take this course, he was very promptly halted by the issuance of a writ of habeas corpus, and he thereupon surrendered the detained into the custody of the court, where this deportation case was then prosecuted. We have a case to cite to the court upon this point, which we feel is worthy of the most serious attention and consideration, and that case is the case of *Re: Tom Hon*, 149 Fed. 842, the opinion of which was written by Whitson, District Judge. Tom Hon was illegally in the United States, just as was Gin Dock Sue. Tom Hon was under a judicial order of remand taken into the custody of the Immigration officials for deportation to China. Tom Hon not only had the adverse finding of the appropriate customs or immigration authorities against him, but he had the valid judgment of the District Court registered against him, and yet as to him the court held:

“It has been suggested that, inasmuch as the judgment is valid upon its face, the defendant should under it be remanded to the vessel, and be left to his remedy by writ of habeas corpus, whereby, if his contention is correct, he could be immediately discharged. Whether he could be so discharged by that method, in the light of the *Ju Toy* case, it may be confessed is open to doubt; but certainly, when a national court has

jurisdiction over a Chinese person who claims to be a native-born citizen of the United States, who has been continuously in the country for the past sixteen years, and who has lived here most of his life, it will not subject him to the hazard of summary banishment upon a judgment which has been annulled by congressional legislation, without at least giving him an opportunity of presenting proofs of his citizenship and to establish the right to live in his native land.”

In the case of *Tom Hon*, the court held that there was no subsisting judgment because *Tom Hon* had procured a certificate of registration and cured the illegality of his residence. In the present case *Gin Dock Sue* acquired a mercantile status and acquired an official position as a Consular attache, both of which are recognized by the statute, and considering the long lapse of time, and the entire history of *Gin Dock Sue*’s residence in the United States it seems that every compelling force of equity and justice should bespeak the favorable consideration of the court for him. In the case of *U. S. vs. Ju Toy*, 198 U. S. 253, counsel for the appellant contended that a limitation should be read into the law. In other words, that when the law said in every case there should be excepted from this the case when citizenship was involved, and upon that point the Supreme Court said:

“It is established, as we have said, that the act purports to make the decision of the Department final, whatever the ground on which the right to enter the country is claimed,—as well when it is citizenship as when it is domicil, and the belonging to a class excepted from the exclusion acts. *U. S. vs. Sing Tuck*, 194 U. S. 161, 167, 48 L. ed. 917, 920, 24 Sup. Ct. Rep. 621; *Lem Moon Sing vs. United States*, 158 U. S. 538, 546, 547, 39 L. ed. 1082, 15 Sup. Ct. Rep. 967. It also is established by the former case and others which it cites that the relevant portion of the act of Aug. 18, 1894 (28 Stat. at L. 372) chap. 301, is not void as a whole. The statute has been upheld and enforced. But the relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again. (Omitting cited cases.)

In the present case this Honorable Court, it seems, has attempted to read into the law a similar exception, that is,—that all aliens who enter in violation of law, or who are found here in violation of law, should not be meant to include those whose status had been adversely determined by the appropriate customs or immigration officials. We feel that any such limitation upon the plain wording of the stat-

ute is unwarranted, and is a doing of the very thing which the Supreme Court says shall not be done in *U. S. vs. Ju Toy*, *supra*. In other words, we feel that the decision of Judge Dooling in issuing the order to show cause in this case, when the Immigration authorities took the appellant into custody and attempted to summarily deport him upon a five and one-half year old denial entered in his case, branded their action most certainly and conclusively as an unwarranted and illegal action, and that if the appellant was to be deported at all, it could only be after a proper hearing in a court of justice upon the facts involved. The decision of the court in this present matter is virtually to reverse the finding of Judge Dooling in entertaining the petition for a writ of habeas corpus in the first instance. We do not feel that because the application of the detained to enter the United States was denied or prejudicially considered before his escape, exempt him from the plain all-embracing phrase in the law, of one found illegally in the United States, or who entered in violation of law. Clearly the appellant should be charged with being unlawfully in the United States irrespective of whether his right to entry had been previously predetermined or not.

In finally submitting this matter for the consideration of the court, we feel that the strong equities of the case should prevail and should come to the assistance of this appellant. That the court should not stop alone at the one fact that the appellant escaped from detention, but should really look into the facts and see why that detention existed in the first

place. If the appropriate customs and immigration officials had followed the statute, there would have been no detention, because appellant would have been permitted to go to China as a laborer, and have been landed as such upon his return. The fact that he did not do so was not the fault of the appellant, but the fault of the relators, in refusing him the certificate to which he was entitled by law.

Respectfully submitted.

GEORGE A. McGOWAN,
Attorney for Appellant.

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for a rehearing is in judgment of counsel well founded, and is not interposed for delay.

GEORGE A. McGOWAN,
Attorney for Appellant.

No. 2864

United States
Circuit Court of Appeals
For the Ninth Circuit.

NG CHOY FONG,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
District Court of the United States for the
Northern District of California,
First Division.

Filed

JAN 15 1917

F. D. Monckton,
Clerk.

United States
Circuit Court of Appeals
For the Ninth Circuit.

NG CHOY FONG,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the
District Court of the United States for the
Northern District of California,
First Division.

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Names of Attorneys of Record.

For the United States: UNITED STATES ATTORNEY.

For the Defendant: GEORGE J. HATFIELD,
Esquire.

*In the District Court of the United States, for the
Northern District of California, First Division.*

No. 5779.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NG CHOY FONG,

Defendant.

Praeceptum for Transcript of Record.

To the Clerk of said Court:

Please make return to the Writ of Error issued by transmitting to the United States Circuit Court of Appeals for the Ninth Circuit true copies of the following, viz.:

The Indictment.

Minutes Showing Arraignment and Plea.

Minutes of Trial.

Verdict.

Judgment.

Petition for Writ of Errors.

Assignment of Errors.

Writ of Errors.

Order Allowing Writ of Errors.

Bill of Exceptions.

Also transmit original Writ of Error and Original Citation thereon, and certify to above as being the return to the Writ of Error, and also certify the admission of receipt of papers.

Dated at San Francisco, California, this 31st day of August, A. D. 1916.

GEO. J. HATFIELD,
Attorney for Defendant.

[Endorsed]: Filed Aug. 30, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [1*]

Indictment.

Violation Act Feb. 9, '09, as Amended Jan. 17, '14.

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

At a stated term of said court begun and holden at the city and county of San Francisco, within and for the State and Northern District of California on the second Monday of July, in the year of our Lord one thousand nine hundred and fifteen.

The Grand Jurors of the United States of America, within and for the State and District aforesaid, on their oaths present: THAT

NG CHOY FUNG and LO KEUN,
each late of the State and Northern District of California, heretofore, to wit, on or about the twelfth day of August in the year of our Lord one thousand nine hundred and fifteen, at San Francisco, in the

*Page-number appearing at foot of page of original certified Transcript of Record.

State and District aforesaid then and there being, did then and there wilfully, unlawfully, fraudulently and knowingly receive, conceal and facilitate the transportation and concealment after importation, of certain opium, to wit, six hundred and sixty (660) five-tael cans of opium prepared for smoking purposes, which as they, the said Ng Choy Fung and Lo Kuen and each of them, then and there well knew, had been imported into the United States contrary to law.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

JNO. W. PRESTON,
United States Attorney.

[Endorsed]: A True Bill. Fred W. Boole, Foreman Grand Jury. Presented in Open Court and Filed Sept. 27th, 1915. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [2]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Saturday, the 2d day of October, in the year of our Lord, one thousand nine hundred and fifteen. Present: The Honorable MAURICE T. DOOLING, District Judge.

No. 5779.

UNITED STATES OF AMERICA,

vs.

NG CHOY FUNG and LO KUEN.

**Minutes of Court—October 2, 1915, Arraignment
and Plea.**

This case came on regularly this day for the arraignment of defendants Ng Choy Fung and Lo Kuen upon the Indictment herein against them. Mrs. A. A. Adams was present as Assistant United States Attorney and Wm. H. Cook, Esq., as attorney for said defendants. Thereupon said defendants were duly arraigned upon the Indictment herein against them, thru interpreter D. D. Jones, stated their true names to be as contained therein, waived reading of said Indictment and then each of said defendants plead Not Guilty of the offense charged in the Indictment herein against them, which pleas the Court ordered, and the same are hereby, entered. Thereupon the Court ordered that this case be, and the same is hereby, continued until October 9th, 1915, to be set for trial of said defendants upon said Indictment. [3]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Monday, the 20th day of December, in the year of our Lord, one thousand nine hundred and fifteen. Present: The Honorable MAURICE T. DOOLING, District Judge.

No. 5779.

UNITED STATES OF AMERICA,

vs.

NG CHOY FUNG et al.

Minutes of Court—December 20, 1915, Trial.

This case came on regularly this day for the trial of defendants herein, Ng Choy Fung and Lo Kuen, each of whom were present in court with their attorney, Wm. H. Cook, Esq. M. A. Thomas, Esq., was present as Assistant United States Attorney. After hearing Mr. Cook and Mr. Thomas, the Court ordered that said trial do now proceed so far as the impanelment of a jury and that the defendants herein may leave the court room and that said jury be impaneled during their absence. Accordingly, the hereinafter named persons were duly drawn by lot from the regular Panel of Trial Jurors of this court, sworn and examined, to wit, E. W. Brown, Harry E. Leland, accepted, Wm. J. O'Donnell, Wm. W. Alverson, challenged for cause by defendants, allowed by the Court and ordered Jurors excused, John Stanton, John H. Clendenning, Squire V. Mooney,

and Fred'k C. Clift, peremptorily challenged by the United States and Jurors excused, Fred'k R. Sherman, M. J. Calnan, John B. Murphy and Philip S. Baker, peremptorily challenged by defendants and Jurors excused, Edwin E. Cox, H. M. Alexander, Oscar P. Nauert, Moses Stern, Dixwell Davenport, A. D. Shepard, Watson Mallott, Constant Messe, Frederick Meyers and Richard J. Brode, accepted. Thereupon twelve (12) persons having [4] been accepted as Jurors to try the defendant herein, were duly sworn accordingly, to wit:

E. W. Brown,	Dixwell Davenport,
Harry E. Leland,	A. D. Shepard,
Edwin E. Cox,	Watson Mallott,
H. M. Alexander,	Constant Messe,
Oscar P. Nauert,	Frederick Meyers,
Moses Stern,	Richard J. Brode.

Thereupon the Court ordered that the further trial of defendants herein be, and the same is hereby, continued until December 21st, 1915, at 10 o'clock A. M., and that all parties be and appear accordingly. Further ordered, on motion of Mr. Thomas, that all persons subpoenaed as witnesses herein be, and they are hereby, excused until December 21st, 1915, and that they be and appear on said day accordingly. [5]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Tuesday, the 21st day of December, in the year of our Lord, one thousand nine hundred and fifteen. Present: The Honorable MAURICE T. DOOLING, District Judge.

No. 5779.

UNITED STATES OF AMERICA,

vs.

NG CHOY FUNG et al.

Minutes of Court—December 21, 1915, Trial.

This case came on regularly this day for the further trial of defendants Ng Choy Fung and Lo Kuen upon the Indictment herein against them. Said defendants were present in court with their attorney, Wm. H. Cook, Esq. M. A. Thomas, Esq., was present as Assistant United States Attorney. The jury heretofore sworn to try said defendants was present and complete. Mr. Thomas made statement to the Court and Jury and called E. E. Enlow, John Toland and George W. Desmond, each of whom were duly sworn and examined on behalf of the United States, and introduced in evidence certain trunk, box, two (2) suit cases and satchel or case containing cans of opium, which were filed and marked U. S. Exhibit No. 1, and rested. Mr. Cook then called Lo Kuen (defendant), and Lee Kum, each of whom were duly sworn and examined on behalf of defend-

ants, thru Chinese Interpreter D. D. Jones, and Lee Hong, who was duly sworn and examined on behalf of said defendants, and recalled Lo Kuen, who was further examined through Interpreter D. D. Jones, and Dr. J. E. Gardiner, who was duly sworn accordingly. Ng Chong Fung (defendant) was duly sworn and examined on behalf of defendants, thru interpreter D. D. Jones. Thereupon the hour of adjournment having arrived, the Court ordered that the further trial of this case continue until December 22d, 1915, at 10 o'clock A. M., and that all parties be and appear on said day accordingly. [6]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Wednesday, the 22d day of December, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable MAURICE T. DOOLING, District Judge.

No. 5779.

UNITED STATES OF AMERICA,

vs.

NG CHOY FUNG et al.

Minutes of Court—December 22, 1915, Trial.

This case came on regularly this day for the further trial of defendants Ng Choy Fung and Lo Kuen upon the Indictment herein against them. Said defendants were present in court with their Attorney,

Wm. H. Cook, Esq. M. A. Thomas, Esq., was present on behalf of the United States as Assistant United States Attorney. The jury heretofore sworn herein was present and complete. Defendant Ng Choy Fung, resumed the stand and was further examined. Mr. Cook then rested case on behalf of defendants. Mr. Thomas presented and introduced in evidence certain gas bills, which were filed and marked U. S. Exhibit No. 2, and called in rebuttal Dr. J. E. Gardiner, who was duly sworn and examined on behalf of the United States, and thereupon rested case on behalf of the United States. The case was then argued by Mr. Thomas and Mr. Cook and submitted. Thereupon the Court proceeded to instruct the jury herein, who after being so instructed, retired at 1 o'clock and 5 minutes P. M., to deliberate upon their Verdict and subsequently returned into court at 4 o'clock P. M., and upon being called all twelve (12) jurors answered to their names and were found to be present and in answer to question of the Court stated they had agreed upon a Verdict and presented written [7] verdicts, which the Court ordered filed and recorded and which Verdicts are as follows:

"We, the Jury, find Ng Choy Fung, the defendant at the bar Guilty.

H. E. LELAND,
Foreman."

"We, the Jury, find Lo Kuen, the defendant at the bar Not Guilty.

H. E. LELAND,
Foreman."

Thereupon, after hearing counsel, the Court ordered that this case be, and the same is hereby, con-

tinued until January 3d, 1916, for the pronouncing of Judgment upon defendant Ng Choy Fung and that defendant Lo Kuen be, and she is hereby, discharged from further custody and that she go hence without day. Further ordered that defendant Ng Choy Fung go at large upon the bond heretofore given and filed for her appearance herein until December 23d, 1915, at noon and that in the meantime she give and file a new bond in the sum of seven thousand five hundred (\$7,500) dollars, for her appearance for Judgment as aforesaid and in default of the giving of such bond she be committed to the custody of the United States Marshal for this District and that Mittimus issue accordingly. Further ordered, on motion of Mr. Thomas, that all the original exhibits introduced and filed herein be forthwith returned to the United States Attorney, or assistant, and accordingly said exhibits were returned to Mr. Thomas in open court.

During the deliberations of the jury herein, it appearing to the Court that said jury should be furnished with dinner, the Court ordered that the United States Marshal for this District furnish the jury herein and two bailiffs with dinner at the expense of the United States. [8]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

No. 5779.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NG CHOY FUNG and LO KUEN,

Defendants.

**Bill of Exceptions on Behalf of Defendant Ng Choy
Fung.**

BE IT REMEMBERED that heretofore the grand jury of the United States, in and for the Northern District of California, did find and return in the above-entitled court its indictment against the defendant Ng Choy Fung, and thereafter the said Ng Choy Fung appeared in said court, and, having duly pleaded as shown by the record herein, and the cause being at issue the same came on for trial before the Honorable Maurice T. Dooling, District Judge, and a jury duly empaneled, the United States being represented by M. A. Thomas, Esq., and Mrs. Annette A. Adams, Assistant United States Attorneys, and the defendant Ng Choy Fung being represented by W. Hoff Cook, Esq., the following proceedings were had:

Testimony of E. E. Enlow, for the Government.

E. E. ENLOW, a witness called on behalf of the United States, being first duly sworn, testified as follows:

(Testimony of E. E. Enlow.)

I reside in San Francisco, am inspector of customs, have been over 23 years. As inspector of customs, it is a [9] part of my duty to look for and make seizures of opium found here. I was custom inspector on the 12th of August, 1915. Now I know these two defendants, Ng Choy Fung and Lo Kuen. I saw them on that day. About ten o'clock on the night of the 12th of August, 1915, we noticed a light in room 2 at 1137 Stockton street. In accordance with some things that we had learned while investigating opium cases, that if we ever saw that light there it would be there in connection with an opium deal, and an investigation should be immediately made. We saw this light at about ten o'clock. Inspector Toland and myself then hunted up police officers Desmond and Meehan. We entered the room. First we entered the door leading from the sidewalk into the hall; we walked up that hall, entered another door into another hall, and then from that hall we entered another door into a small hall that was used by the people in room 1 and room 2. After we entered that small hall, police officer Desmond knocked at the door of room 2, somebody responded in there, but we could not understand. The man from room 1 came out in the hall and he interpreted for Mr. Desmond that some lady was in there taking a bath. That man is in the room now. We gave them plenty of time to open the door. Then Mr. Desmond was about to force the lock. We could smell opium. When he was just about to force the lock, the elder lady, who gives the name of Ng Choy

(Testimony of E. E. Enlow.)

Fung, the one on the left here, opened the door; she was greatly excited. The small lady giving the name of Lo Kuen, was in bed. There were some boards on two horses, on the west side of the room, and a mat over that, a big straw mat of some kind, and comforters for a bed. On the south side of the room was another bunk of that nature, boards [10] placed upon horses, and bedding. On the east side of the room there were two windows facing the street. On the north side of the room there was a small commode, a little gas range and a stationary wash bowl. We found opium in the room. We had been there but a very short time until police officer Desmond reached over behind the bunk where Lo Kuen was in bed, turned the curtains back, and there was a great stack of opium back there. That was in that recess against the door.

Q. Was there any other opium in the room, that you know of? A. Yes, sir.

Mr. COOK.—We object to any opium, except such as is described in the indictment itself, in a five-tael can. I understand the defendants are only charged and can only be convicted, if at all, in relation to some quantity of that kind of packed opium—not loose jars; there are no loose jars described in the Indictment.

The COURT.—I have not heard anything except about tael cans.

Mr. THOMAS.—I asked him if he found any other opium.

Q. Go on with your story, Mr. Enlow.

(Testimony of E. E. Enlow.)

A. In the commode Police Officer Meehan found quite a lot. There were some shelves under the little gas range where Inspector Toland found quite a lot. This trunk was under one of the bunks; I pulled it out into the middle of the room, and later on Inspector Toland opened it up; there was a great deal of paper in the bottom, all saturated with opium.

Mr. COOK.—Q. Do you know which bunk that was under?

A. I believe I pulled that out from under the bunk in which Lo Kuen was in bed. Then there were two small jars of opium which were found in the north end of the room— [11]

Mr. COOK.—We object to anything about any jars of opium.

The COURT.—The objection is overruled.

Mr. COOK.—Exception.

A. There was a hop toy. A hop toy is a small horn box. They put a small quantity of opium in and push a cap down. It is convenient to carry around in the pocket. There was not much in that. I think you will see it later on. It must be here some place in our exhibits. There was a portion of a smoking outfit in the north end of the room; I am not sure whether it was setting on a gas range, but it was in about that part; the lamp was there.

Q. Did you make a further search of that place after this first night that you were in there, and did you find any other? A. Yes, sir.

Q. Where was that?

(Testimony of E. E. Enlow.)

A. Inspector Toland and I went back early the next morning to make a thorough inspection of that room. We removed those bunks, and we lifted the linoleum. Before doing that, in the bunk on the south side of the room, in the comforters—

Mr. COOK.—We object to anything they found the next day, a foundation not having been laid that the room was left or guarded so that anything could have been put in after the defendants were arrested the first day.

Mr. THOMAS.—The appearance of the room might have something to do with that.

Mr. COOK.—I object on the ground that no foundation is laid to show what happened after they had taken the defendants from that room, *non constat* that somebody else might have put something in that room after they left.

The COURT.—The objection is overruled. [12]

Mr. COOK.—Exception.

A. We had the keys to the room ourselves over night. We left the room locked. Mr. Toland and I went back next morning. In the bunk on the south side of the room, in the comforters, I shook them out carefully and I found one can of opium there that we had missed the night before. It had just been patched. In the north end of the room some place. Inspector Toland found one small jar of opium that we had missed the night before. Then we removed the horses, the linoleum, and in the southeast corner of the room we found a small panel through the floor, and beneath the floor we

(Testimony of E. E. Enlow.)

found 115 more cans of opium wrapped up in five-can packages. When we went into the room, the elderly lady, Ng Choy Fung, was fully dressed; she grabbed me by the hands and held me there for some little time; she was greatly excited, very nervous. When Officer Desmond had Lo Kuen get out of bed, she was fully dressed; she had shoes on, clothes on, and everything. I have spoken of these cans having the appearance, some of them, of having been washed and patched. There was something else there in the room that indicated that to me, there was at the time I went in the room the first night, a bucket of black water, with little parts of opium labels that had been washed off, and there was opium in the water. That bucket was standing on the floor in the northeast corner of the room.

Q. Mr. Enlow, I show you this quantity of opium in the suit case; will you come down here and see if you can identify these?

A. You must remember that this is all packed different from the way it is now. It was not packed up this way at all. We got these to put them in. [13]

That trunk was in the room, that is the trunk I referred to as being inside the room. We seized the opium that we found there in that room at that time. We kept it in our possession until the next day. About this trunk, we asked them to leave all of that stuff in there. I have not seen where the opium ran out here; I would like to have Mr. Toland look at this. Yes, there is it (pointing).

(Testimony of E. E. Enlow.)

Mr. THOMAS.—I offer in evidence this suitcase and its contents, that is, the opium in the suitcase. The suitcase is marked “Ng Choy Fung and Lo Kuen, Room 2;” also the trunk, with the same marking on it; and a telescope basket; a box containing cans of opium; a canvas-covered suitcase, with the same marking, all containing cans of opium, and ask that they all be marked as “United States Exhibit 1.”

(The articles were here marked “United States Exhibit 1.”)

From my observation and experience in opium and opium seizure, I know whether or not this is opium. I state that it is opium, the entire quantity. It is known as smoking opium. That small glass jar looks like the one that was taken out of the room that night. After the seizure was made on the night of August 12th, we placed these defendants in the city prison over night, and the next morning we took them down to special agent Tidwell’s office. There was no search made of their person that I know of, not in my presence. I believe Inspector Toland can tell about that. There were very few, not many, cooking utensils there in the room that I noticed. There were no women’s clothes hanging on the wall at all; there was one pair of pants and one vest hanging on the wall. Well, I would not say positively that we did not find a little something in the way of women’s clothes in some [14] of these boxes under the bed; there might have been a very small amount, but there was none to speak of. As to how far the cans which were stacked up be-

(Testimony of E. E. Enlow.)

hind against the door were from the bed where Lo Kuen was lying, the shelf back of the bed was fitted in the doorway, and I should think that one shelf was about eight inches wide, the lower shelf next to the bed. Of course, a person lying in the bed would put their hand right on the opium very easily: The bed itself,—the bunk—came right up next to the shelf. I had very little conversation with either of these defendants that night. The next day we had a conversation with them. That was in Mr. Tidwell's office, but the conversation was carried on through an interpreter, Dr. Gardner. I only know what the defendants said as interpreted through Dr. Gardner, by questions put to them by Mr. Tidwell. Miss Cameron was not there. I think we asked the defendants on the night of August 12th, what their names were, but I don't know what they said; I know that they were jailed under different names that night, Jane Doe and such as that. We didn't get their right names that night.

Cross-examination.

On cross-examination the witness testified as follows:

I had been in the premises 1137 Stockton Street before that night. I am not very familiar with the place. I just searched one room in there once before. It was not the room of either one of these defendants. I believe it was room 12. That was two years ago. It had not connection with this case whatever. I had not been there recently at all. The upper floors of that building at 1137 Stockton

(Testimony of E. E. Enlow.)

street are a rooming or an apartment house, rented out to Chinese, and the lower story is for a noodle factory, I believe. [15] There is a noodle factory down below on the street. The first door I went through was the street door. That was a closed door that was open to anyone, without being particular in any way, to go into that building, that is it was that time; I don't know whether they locked it up, or not. I had no difficulty in opening that door; anybody could have gone in there. I don't remember whether there was any light in the hallway, or not. Having entered the street door, I went up-stairs, straight up to the first floor, as they got near the first floor, they turned to the left and made a sort of an ell, right to the left of another door there. And then I came into a hallway that runs the entire length of the building east and west, with the exception of the front part of the room, which don't run clear to the street; from the head of the stairs it does. There was a door at the head of the stairs when I got up to that first hallway. It was unlocked. I had no difficulty in going through there. The first two doors I went through were doors that anybody could have come up from the street and gone through, just at that time, as I did. Down that long hallway running east and west are different rooms, living rooms. Toilets are back there. And wash rooms, I believe. Room 12 was on the same floor that room 2 was. I had never seen this defendant, Ng Choy Fung, before the night that I arrested her that I remember. Reaching the top of the stairs from the street into the first hallway, I

(Testimony of E. E. Enlow.)

then turned to my left, facing toward Stockton street. To go toward rooms 1 and 2, I faced Stockton street. As I reached there, there was a doorway to a small room. I don't remember about that door being locked, but I know that we had no trouble whatever at that door. Going through that doorway, we came into a little hallway, and on the left of [16] that hallway is the door to room 1, and almost on the right, or diagonally across from that is the doorway to room 2. I don't think we knocked at room 1 first; we did that after we could not get in room 2. We heard some Chinese talk inside that we could not understand. When we knocked at room 1, a Chinaman opened the door. I don't remember if I took his name at that time. He was a witness on behalf of the defendant at the preliminary examination. His name was Lee Kum. Mr. Thomas and I did not go up to see him yesterday after this jury had been empaneled. We went up and inspected the room, and we talked to this Chinese, Lee Kum. We knew that he was a witness for the defense. We did not threaten him yesterday. We saw him there that night when he interpreted for us. He said the woman was taking a bath; that the woman said she was taking a bath, and to wait a few minutes, and we did. I mean to say, that is what he said, that the woman had answered through the door. I didn't hear anything about opening the door. The substance of it was that she was taking a bath. We waited a certain length of time and then asked again. We might

(Testimony of E. E. Enlow.)

have asked this man who lived in that room when we knocked at room 1; we asked him to tell in particular who we were, that we were officers and we wanted to go in that room. The instant we opened the door we did not see any opium in sight. Well, before we got the cans we had to pull curtains back and coverings. Hanging around the bunk where Lo Kuen was, there was some sort of cloth, a curtain, or a portiere, or something wound down in front of the shelves. I have seen curtain beds or bunks. There was a curtain like that a portion of the way around, at least. I guess that it is a fact that I could not see any of those tins of opium behind that bunk where Lo Kuen was until I leaned [17] over and examined them and searched for them. I didn't try it from all angles, but I suppose that is a fact. I think there were no indications of any tins of opium in sight. I think that is true. Speaking of the cans, you and I might have been visitors there and been perfectly innocent that there was any opium concealed there from what we could see. I don't remember seeing any tins of opium out in open sight. I believe there was a shelf over the bunk, on the south side of the room, which bunk was the one that was unoccupied when we entered the room, and apparently was the one used by the defendant Ng Choy Fung. I don't remember whether that shelf had a curtain or not, you have got me in regard to that, but I remember a shelf being in there. All of those tins—that we found—were not wrapped up in paper like that, they all had not been cleaned yet. The tins that we found behind

(Testimony of E. E. Enlow.)

the bunk, where we found Lo Kuen, were wrapped up in newspaper like this. All of them. I don't remember of any cans being found on the south side of the room, on the shelf. There was a bunk on the west side of the room that Lo Kuen was on. And that was up against a doorway, against a jamb of the door. And there was a space from the outside portion of the woodwork of that doorway into the door itself, maybe of about 8 inches. The ordinary in-set of a door. Where these cans were packed, a shelf had been put in down below the top of that bed in that in-set in the door. There was one shelf there. It was almost up to the top of the bunk. The bunk was up against the framework of the door and a portion of these tins were all wrapped up in paper as the packages are here on that little shelf on the in-set of that door. There was a shelf about that bed, above the door. I don't know whether any of the in-set extended below the door, but here [18] was one shelf up here and down there about a foot there was another one. There was opium stacked in between these two shelves up there. That was all wrapped up in paper, just similar to this. As I look at all these tins of opium, as you hold that one now, I could not say what was in there, I could not tell. That was the condition of all the tins we found on the shelves back of Lo Kuen's bunk; that is my recollection. I am not quite clear about how the opium in the trunk was found. Inspector Toland, I believe, can tell more about that trunk. The trunk was closed. It was hidden underneath the bunk where Lo Kuen was. Nobody could tell what

(Testimony of E. E. Enlow.)

was in there until they brought it out and opened it. The 115 cans we found under the floor the next day were wrapped up in paper. I do not know how many of these tins were in the bunk behind where Lo Kuen was found, in the in-set of the door, we did not keep count of them. I would say in the neighborhood of 300 of them. I mean on the two shelves; on all of the shelves. Well, I may be color blind, but the curtain or piece of cloth you now show me looks like the cloth or curtains that those shelves were all covered with, so that these boxes were hidden behind them. As to where we found any of the opium that was not wrapped up in newspaper wrapping—any of the five-tael tins of opium—I cannot just say what part of the room, but some place toward the north end of the room; it was not the south end of the room, for I was in the south end of the room with that big box, I believe, and some other things, stacking the opium while Mr. Desmond was handing it out from behind the bed, and the other officers were finding it in the north end of the room, some place there. But when I went in the room, I didn't see any five-tael can of opium like that exposed to view. I cannot testify positively as to [19] some Chinese herbs being in a kettle or saucepan on top of that stove. I believe I heard them speaking about something of the kind being there. I saw some cooking utensils and a small amount of edibles, some food. We did not keep that bucket or any of its contents. We had all the evidence we needed. Plenty of officers will testify to the labels I saw in there. That is the

(Testimony of E. E. Enlow.)

only reason I can think of why we didn't keep those labels. I did not take any part of the contents out of that bucket. It is not a mere guess when I say they looked like labels. I knew they were labels, simply by looking at them. Taking this box, I saw some portion of the paper label, that would wash off when they were washing them up, in that tin can or bucket. Some portion of that red,—not a whole label, I don't mean that. I don't know if that has a London stamp on it. I think there was very little of it that had a London stamp on. That has not. We only detected that London stamp on a very small amount of them. I did not see any new labels in that room. Taking these two boxes out of one of the bundles wrapped up, that represents the general condition of the contents, and the appearance of the five-tael cans. Of course, where some had leaked, they would have to wash them more. I looked at several of them. In general, that is the aspect and appearance of these five-tael—660 five-tael tins, with the exception that on some of them the labels have washed off more, and some of them have leaked; they are actually patched; if we look through them we will find some patches there where they leaked. I went with these defendants after their arrest to the city prison, to the lower part; Inspector Toland went up into the building with them; I stayed with the opium. I don't know that they had no opportunity to or that they did not communicate with [20] any attorney or any other person in relation to their arrest prior to the time that Mr. Tidwell took their statements;

(Testimony of E. E. Enlow.)

we didn't want them to, at any rate. I don't know that there were instructions that they should not. It is the usual instruction, there, that a Federal prisoner cannot do that. So far as I know they were interviewed by Mr. Tidwell prior to the employment of any attorney to defend them. I cannot quote anything that the elderly woman said, but I gathered from it that she was trying to make out that she was sick; she wanted to leave the room. She did not attempt to offer any resistance, or did not try to attempt to conceal anything in my presence. Neither of them did. I think Ng Choy Fung had the keys to that room when we left that night after the arrest. The keys, as I understand it, were taken from her down at the prison; but I swung the door shut, and it snapped itself; I know that positively, because I had left my cravenette in the room, and I could not get into the room. Then I thought, "Well, it will be safe there until morning." Then later on Mr. Toland got the keys, and when we went back the second time we had the keys to enter with. I say we found a pair of trousers and a vest hanging in that room; we did not take them. I do not know to whom they belonged. I never made any inquiry. We don't know whether or not the owner of the trousers and the vest went to that room with a key after we had made the arrest. We didn't leave anybody to guard the room. All we did was to come out and shut the door, and the latch snapped on it. I don't know whether anyone had been in that room from the time we made the arrest until the next day. Speaking about this pipe, I believe

(Testimony of E. E. Enlow.)

they found that on the old lady—Mr. Toland did. Mr. Toland can tell you about that; I never saw the pipe. It was found on her person, and the [21] little opium that would be used by such a person; that is what the little horn container I speak of was. But the one we have here, I believe, is not the one that was found on her at the jail. I think that the one we have here was taken from the room. I understand that there was a very small quantity of opium found on her; I never saw it. It was about the quantity that a person who was using opium would have for the purpose of using that pipe. So far as the young woman was concerned, I found no indication of her smoking. I did not ask the younger woman why she was there. We didn't have the story that night, that she had come up there because the old woman got hurt and she came up to nurse her. She wanted to leave. She made us understand that she wanted to go home. We got that story the next day. We took her down to Mr. Tidwell shortly after nine o'clock the next day. I know Miss Cameron of the Presbyterian Mission. I don't remember seeing her down there next morning at all. I do not remember her being there and asking the old woman to say who owned this stuff. I was not in the office all the time that morning, but I don't remember seeing Miss Donal-ina Cameron there at all. Inspector Toland was with me at ten o'clock that evening when we saw the light in room 2. We were walking along on Stockton street. We had been around Chinatown all evening. I think we had passed once near that

(Testimony of E. E. Enlow.)

locality where we could see the front of that building; had been up there earlier in the evening. I don't remember, I don't think there was a light in the room then. I don't think we looked for a light then. I am not sure that we were along there before that until about nine or ten o'clock that night. It was sometime that night, it may have been after six o'clock, that we got that information, to look for a light [22] in that room; that if there was a light in that room, to look out for some opium steal or transaction going on. We did not know when it would be; we were hardly expecting to find any light there that night. I don't know that we got that information within an hour of ten o'clock—well, I guess it was about an hour. It was during that evening when we got that little tip, but we were investigating another thing in connection with some large cans, empty cans that we found about the street. We received some information sometime, say, between six and ten o'clock that if we saw a light in room 2, at 1137 Stockton street to look out, that there would be some deal going on in relation to opium transactions; our information was something of that nature. There was to be a woman in the transaction. I did not know, from the outside of the building. Looking at the outside of 1137 Stockton Street, which window was the window of room 2. When we got in the small hallway there was a number over the door. Until we got into the small hallway, we did not know which room, Room 1, or which room Room 2 was. After arresting these people, we took this property down to the

(Testimony of E. E. Enlow.)

customs-house, and Inspector Toland and myself stayed by it until the next morning about half-past six o'clock, when special agent Tidwell of the treasury department and customs agent Salter relieved us. We took it down that same night in the police patrol wagon. This opium will be destroyed by the Government after the case is over. When I said we took all this opium down that night, I mean we took down all we found that night, all but 116 cans and one small jar. I don't remember whether or not I saw that bucket there the next day when I went back. We didn't take it with us. [23]

Redirect Examination.

On redirect examination, the witness testified as follows:

When we went back to Room 2 the next morning, things there appeared to us in the same condition as we left them the night before. I found my cravenette there. If I was lying on the bunk where Lo Kuen was lying on the night of August 12th, it would not be necessary for me to lean over and strain and stretch to find that opium that was stored behind the bunk. I could simply lay my hand right on it. The condition of that water in that bucket that was there was black, like molasses, very dark. I know opium was in that water. We could smell opium after we entered that room on the evening of August 12th; and we could also smell it on the outside in the hallway. There was not any door leading directly from Room 1 to Room 2. One door in Room 2 was located in the northwest corner; the

(Testimony of E. E. Enlow.)

other was one in the west side of the room.

Q. Mr. Enlow, you were asked by counsel about a visit that you made to the room on yesterday, to room 2; will you state to the jury and to the Court what was done on that visit to that room yesterday by you or by me?

Mr. COOK.—We object to that as not redirect. My cross-examination was directed to a conversation with a witness for the defense.

Mr. THOMAS.—You asked him if he did not go up there, and if he did not try to threaten this man.

The COURT.—The objection is overruled.

Mr. Thomas wanted to see just the location of this room, and how all those bunks and beds and so on were in relation to the room; we went down up to room 1 and knocked and knocked, and could get no response,—I am wrong about that, it was room 2. We got no response. We then knocked at room 1 [24] and a man came out. We told him what we wanted to do, we wanted to look at that room, and he told us that the old lady didn't live there any more. We asked him to speak in Chinese to whoever was in there and tell him who we were, that we just wanted to look in the room; to get the door open I kept trying, and finally the door opened, and there was somebody in bed there all covered up; we didn't see whether it was a man or a woman; we saw a man's clothing on the outside; we presumed it was just as the Chinese in room 1 had told us, a sick man. There were no threats made by any of us, either Mr. Thomas or me, to Lee Kum,

(Testimony of E. E. Enlow.)

or anybody there in the premises. I testified to that, that there was no threat at all.

Recross-examination.

On recross-examination, the witness testified.

There was some conversation, concerning when Lee Kum first saw this little Chinese woman, Lo Kuen, in that place; I think the remark was three days. We were questioning Lee Kum about whether the old woman was still living there yet. We were questioning a witness for the defense because we had talked to that man at the time of the arrest that night, and we might possibly need him ourselves. We didn't bring him, we didn't need him.

Further Redirect Examination.

On further redirect examination, the witness testified:

There was some talk over the fact that if this man was not coming out for the defense, we were going to subpoena him for the prosecution, that we may use him. What both of us were questioning him about was about the gas bills. I went to the gas company to find out just where they collected the gas bill for these rooms, room 2; the collector said that [25] he collected it from room 2 the most of the time, and part of the time he would go to Room 1 and collect from a lady there. That is what we wanted to talk about there. We knew for a long time in whose name the gas bill was. It was in the name of See Ping.

Testimony of John Toland, for the Government.

JOHN TOLAND, a witness called on behalf of the United States, being first duly sworn, testified as follows:

My business is inspector of customs. I have been inspector of customs about fifteen years. I was at room 2 at 1137 Stockton Street on August 12, 1915. We saw this light, and we went there. First, before going up, we realized that it was night-time, and we wanted some assistance, in order to get into the room, in case they refused to let us in, whoever might be in there. We went down to Grant Avenue and got police officers Desmond and Meehan to come up. The police officers entered the door first, Mr. Enlow followed, and I was in the rear. We went up the stairs, turned to the left, through the first door at the top of the stairs, and again to the left, coming to the front of the building, and opened that door, and knocked on the door at room 2, and there was someone answered from inside, *there was someone answered from inside*, there was some little delay about getting the door open, and I left and went down the stairs again and went out on the street and remained there until I was satisfied that the rest of the officers were in the room; I did that for the purpose of preventing anything being thrown out of those windows onto the street during the time they were getting in there. After I was sure that they were in the room, I went back upstairs and went in the room. They had found considerable of this opium [26] around in various

(Testimony of John Toland.)

places in the room when I got there, it was piled up on the floor, and they were taking it off the shelves. I began to search on the north side of the room, that was where the gas burner and the small commode were; underneath the gas burner was a boxed-in affair, with shelves in it; I opened that, and it was full of those packages; I pulled those out; I think it was Mr. Meehan who was taking it out of the commode that was alongside the gas stock, all packages like that, until we had gathered up 541 cans, or something like that, and packed it in boxes and trunks and sent for the patrol wagon and had them taken down to the custom-house. I saw these two defendants there that night; they were in the room when I got back up in there. I saw a bucket in the room. It was an ordinary water-bucket; it sat in the northeast corner of the room, just near where the wash-bowl was. It was out a little on the floor. It was nearly full of dirty water, water that contained opium. I could tell that from the smell. It was also full of scraps of those labels similar to the labels on the can. I got in the room again the next day, early in the morning; I should say it was nearly seven o'clock, or half-past six, or somewhere around there. I left the room locked the night before.

Q. What did you find there the next morning?

Mr. COOK.—We object to that as immaterial, irrelevant and incompetent, and the foundation is not laid to show that the room was not entered by somebody else in the meantime.

(Testimony of John Toland.)

The COURT.—The objection is overruled.

Mr. COOK.—Exception.

We found the room in the same condition, as near as I can recollect, as the way we left it the night before. It was considerably tumbled up. Mr. Enlow first found another can [27] of opium on the bunk, or in some part of the bunk, wrapped up, on the south side of the room. I began to search again on the north side, around where the commode and the gas stove were, and I found one of those bowls, or that small bowl you had out a few minutes ago. We had missed that the night before. Shortly after that, Mr. Enlow had lifted the linoleum from the floor under the bed on the south side, and he said, "There is a hole here," and he lifted one of the boards. He said, "This must be the rest of it," and began to pull out packages of opium. I went over and helped him, and we pulled out the other 116 cans. The defendants were put in a patrol wagon that night and taken down to the Hall of Justice. I went with them. The matron at the city jail searched them; or at least, she reported that she did. I asked that they be searched. The police officer there got the matron to take them in a room there and search them. I didn't see any cans of opium in the trunk. There was a large painted carton that had had opium in it, it was full of opium stains; it was about 14 inches long, I should judge, by about 7 or 8 inches wide, possibly 5 inches high; it had been cut open, it had been sealed; it was a double can, one can inside the

(Testimony of John Toland.)

other, sealed; and it had been cut open and the top turned back. There were opium stains in that. That was in the trunk. Also a lot of papers. There were no five-tael cans of opium in the trunk.

Cross-examination.

On cross-examination, the witness testified:

I mean at the time that the trunk was found there were no five-tael cans in it. The trunk was simply utilized by us for the purpose of packing these things in to take them away from that room. I think all the receptacles here were [28] taken from that room. That box was pulled out from under the bunk on the west side and whatever stuff was in it—I forgot just what the nature of the goods was that was in it—was taken out and we picked those things up in the room. I cannot fix the location of where I found the first suitcase. None of this stuff that is here in court now packed in any one of the receptacles that they are in now, was in any one of such receptacles at the time I went into that room. None that I saw. I didn't see all of the suitcases in the room individually. I don't think I examined any suitcase whatever. The trunk has stain. The carton is not here; it is a tin box; it looks like a five-gallon ordinary coal oil can cut in half lengthwise. As to the receptacles that are here in court, I didn't see any signs of opium leaking or stains, except in the trunk itself; that is the only one I noticed. I am pretty sure that that box was pulled from the bunk on the west side of

(Testimony of John Toland.)

the room; and I think we used that to pack the opium in. I didn't go up into the room where this arrest was made until a few minutes after the arrest was made. I don't know where Lo Kuen was, or where the other defendant was, relatively, at the time the other men went in there. I was not there. When I went into the room, the two defendants were standing right in the middle of the room. I noticed curtains around some of the shelves. I think Officer Desmond was just about getting this stuff out from back of the bunk on the west side when I got in there. I did not see what they removed to uncover and disclose it before they took it out. As far as anything that I found myself, that was concealed from view at the time. In other words, you and I might have gone into that room as visitors and been there as visitors without seeing anything about the opium, except the smell. I don't know [29] about the curtain on the west side. I don't believe that that shut the opium out entirely; I believe a person could see those packages on the shelf. You could not tell what was inside them. Assuming anyone saw those packages, there was no indication to a person not connected with an opium deal to know that there was any opium concealed there. I said we took 116—or 115 cans. If I used the word "other," I meant to cover what we have here. I am not going to answer yet as to how many I expected to find. I would say it was about seven o'clock that evening that Mr. Enlow and I started on work of inspection—went to Chinatown after

(Testimony of John Toland.)

dinner that evening. We were all over Chinatown. I think we went up Sacramento street, if I recollect right, to Stockton; we walked up from Kearney, up Sacramento to Grant Avenue, and on up to Stockton.

Q. When you went up Sacramento street to Stockton, did you have 1137 Stockton street as an objective point.

Mr. THOMAS.—I object to that as not proper cross-examination.

The COURT.—The objection is sustained.

I could not tell what time we got on the block of Stockton street between Jackson and Pacific that night for the first time. We were up and down Stockton street and Grant Avenue and Powell Street. I didn't pay any attention to the time. I don't recollect just what time in the night we began to look for lights. I think the arrest was made a little later than ten o'clock. I don't think we were on Stockton street between Jackson and Pacific between six and seven o'clock. We might have been between seven and eight o'clock. I did not see this little woman on the street that evening. I didn't see her. I know her very well. I would have noticed her if I had seen her. To my recollection I had not seen [30] the defendant Ng Choy Fung before. I did not see the vest and trousers in the room. I think to-day is the first I heard of them. I have not paid any attention to them before, I had not heard of it. I assisted in the search. I was searching for opium. I was not searching to find out whether there were any chinese women's clothes. There was not very

(Testimony of John Toland.)

much there; there was not much wearing apparel of any kind in the room. There were some vessels on top of that stove. I don't know whether you would call them saucepans or not; they were round vessels with handles on them. There was some kind of chow in them, I don't know what it was. I remember testifying before the Commissioner that there was something on top of the stove, and it looked as if they had been cooking something. That is the fact, but I don't know what the substance was. We didn't think it was necessary to keep that bucket and the contents. It would have been quite a job to load a bucketful of that slop into the patrol wagon and haul it down to the station. We didn't take any of the contents of that bucket, labels, or anything else. I made an examination of the bucket, it was not a casual glance. I got down and took my lead pencil out of my pocket and took a lot of the scraps of these labels out of the dirty water and took a good look at them and put them back again. I didn't keep them. I went down to the city prison at the time these parties were arrested. I was there next morning when they were interviewed by Mr. Tidwell. I could not testify to who was the last to come out of the room after the arrest, because when the first lot of opium was taken down, I went down with it, and it was put in the patrol wagon, and I stayed there on the street. One of these officers, after the arrest was made, or after I made this collection of stuff [31] I was seizing, 'phoned for the patrol wagon. And I

(Testimony of John Toland.)

packed up the stuff in these different containers to cart away and guard over night at the custom-house, or some place of safe-keeping. We took the prisoners with us at that time. I was not the last one to leave the room. I went down with the opium; I forget whether it was the trunk or one of the boxes, but I went down with that, and when it was put in the patrol wagon, I stayed there. Some other policemen came up with the wagon and they assisted in carrying this down; who was the last to leave the room I do not know. Mr. Enlow went with me the next morning to the room on Stockton street. He was the only one; no officers. He and I were the only ones who made the search. The matron gave me some keys which she said she had taken from the elderly lady at the city jail that night. I have the keys in my pocket; there were several keys. They were on a ring. I have only the matron's statement as to who the keys were taken from. She said she took them from the elderly lady. There is a key that opens the door that leads to the sidewalk; also a key for the door at the head of the stairs, a key for the door going through the hall, and a key to room 2. There are more than four keys. I had to use the key for going in the little hallway to rooms 1 and 2 when I went back the next morning. I only used the key in the door; the door at the head of the stairs was open and the door from the street or the sidewalk into the hallway was open.

I took these two defendants down to Mr. Tidwell's

(Testimony of John Toland.)

office the next morning after the arrest. I don't recollect now who was with me. I think there was another officer sent up for the surveyor's department. I think it was Mr. Tidwell. I don't think Mr. Enlow went up the next morning. I should [32] judge I took them down about half-past nine or a quarter to ten. Mr. Enlow and I had been up to the rooms at 1137 Stockton street earlier in the morning, and taken charge of this other stuff I have spoken about, and taken it down to Mr. Tidwell's office. And then I went up to the city prison; and I took my two prisoners down to Mr. Tidwell's office for an interview. No police officers went with me at that time. There were no other police officers involved in this transaction with me, acting with me, other than Mr. Desmond and Mr. Meehan. Their connection with the matter commenced after I saw the light, and it ended after the arrest. When I went down to Mr. Tidwell's office with these two defendants, there was there besides myself, Mr. Tidwell and the two defendants, the rest of the office force in the different departments; there are three rooms there. Right in the room itself where the interview took place there was just Mr. Tidwell at the time we took them down first. I was present at the time they were interrogated by Mr. Tidwell and Dr. Gardner was there acting as interpreter. I think we took the two defendants into the business office first, and then took them into the office farthest south, and one by one—I think we took one in at a time in Mr. Tidwell's office; then later both were

(Testimony of John Toland.)

in there together. I was present at the time either or both of them were being interrogated at all times, and Mr. Enlow was there. I do not think there was anyone else. I know Miss Cameron. It is my recollection that she came there in the morning before we went up to the prison for them; it appears to me she came into the office after we took the 115 cans to Mr. Tidwell's office. There was some little time elapsed, maybe 15 or 20 minutes, before we went up to the prison after the defendants, [33] and it appears to me that Miss Cameron was around there at that time. She did not interview them at the request of any of the custom officers. She was not talking with them. She was not there in connection with the case as far as I know. Permit me to correct myself on that; it was at the prison that I saw Miss Cameron, not at Mr. Tidwell's office. When I left Mr. Tidwell's office, between 9:30 and 10, to go to the prison for the women, when I went up to the booking desk Miss Cameron came in while I was waiting there and asked me about these women, and I told her about their arrest, but that is all. I did not see Miss Cameron talking with them there in the prison. Miss Cameron did not say anything to them before they ever made any statement to Mr. Tidwell that I know of. On the evening of the arrest, I was on Stockton street between Pacific and Jackson so I could observe whether there were any lights in room 2 between six and seven o'clock that evening. We might have

(Testimony of John Toland.)

been there between seven and eight. I don't think there were any lights in the room at that time. I looked for lights at that time. I was looking for lights between seven and eight o'clock, and I left and went to some other part of Chinatown altogether. It must have been near nine o'clock—after eight o'clock, half past eight, before I returned to the immediate locality. I do not think I saw any lights then. I didn't see lights burning there all the evening in that room. When I reached the room, there were shades or curtains on the windows. They were down. I don't recollect that there was more than one gas jet in the room; I don't know. It was a fairly well-lighted room when I came inside it. I saw a light in room 1. I don't recollect whether or not I saw any light in room 1 by seven o'clock that night. As [34] a matter of fact, what I am positive about is that about ten o'clock, a little before ten, I did see a light in room 2. We went for the police at somewhere around half-past nine; we first wanted to find the sergeant, but we could not find him, we went back up there again and the lights were still burning; it must have been near ten o'clock; then we went down and got these two officers without seeing the sergeant. I did not see anybody going in or out of the building during any of the times I was there that evening. Well, we were observing pretty nearly everything around that immediate neighborhood about that time. I did not see any Chinaman come out of there that evening with a dark mustache.

**Testimony of George W. Desmond, for the
Government.**

GEORGE W. DESMOND, a witness called on behalf of the United States, being first duly sworn, testified as follows:

I reside in San Francisco. My business is police officer of the city and county of San Francisco. I have been a police officer for seven years. I was a police officer on August 12, 1915. On that day I visited the premises at 1137 Stockton street in this city.

Q. Will you state to the jury and to the Court, Mr. Desmond, what you did there?

A. About ten or a little after ten on that evening I was approached by inspectors Enlow and Toland, and they asked us if we would go to these rooms, they thought there was opium there. We went up there. As soon as I got in the second hallway, I detected the fumes of opium very strong; I traced it to room 2. So I knocked on the door and demanded admission. A female voice, a Chinese, called out something in Chinese. I told her to open the door, that we were the police squad. She called out again, and a Chinaman in room 1, I called him out to interpret, he said that the woman inside was [35] taking a bath. So I got up on the *knock* of the door and looked over the transom—because I knew she was not bathing, because she was standing right inside the door—

Mr. COOK.—I move that that be stricken out as the conclusion of the witness.

(Testimony of George W. Desmond.)

The COURT.—Motion denied.

And I seen her standing in the center of the room, facing the door we were trying to enter. I got down and started to force the door, and she came and opened it. We went in. She got hold of Inspector Enlow. I walked past her and looked around the room, and I seen the smaller woman in the bed, or in the couch there. I seen she was fully dressed. She got up on the floor. I was looking around there, and I noticed these packages in back of the curtain, and I jumped up on the bunk and pulled one out and tore the paper off it, and I saw that it was opium. I started to throw it all down on the bed. I passed it to Inspector Enlow. After we got all the opium we could find, we took the women and the opium and brought the women to the city prison and the opium was sent to the customs-house. I pulled the opium down from right by this bunk or couch used by the Chinese; it is not a bed, it is four or five boards on two carpenter's horses, and some quilts or blankets; right behind this, on the wall, I think there were three shelves, and the opium was piled up on those shelves. Lo Kuen would be lying this way, and this would be the pile in back. I found some other opium over the other bunk; that was on the south side of the room. Personally I found only that opium that I speak of behind the two bunks. I noticed a bottle or a jar of some opium on a stand there. The older woman was fully dressed when I went into the room; [36] just as she is now; she had just as much clothes on her.

(Testimony of George W. Desmond.)

The small woman was fully dressed. I saw a bucket on the floor there; it was nearly full of black liquid, which smelled very much the odor of opium, and also parts of paper. It was small pieces of green paper, some of it was green and some of it was red.

Cross-examination.

On cross-examination the witness testified as follows:

I cannot describe the color of the dress the old lady had on that night. I didn't mean that she was dressed in the particular costume she is in now; I meant she had on as much outside clothing as she has now. I know she had a hairdress on similar to the one she has on now. She was not barefooted. I did not notice what kind of shoes she had on. Maybe it was five minutes from the time I first knocked on room 2 before I finally went into room 2. I don't know in what condition their feet would be as to whether it was long enough for a person to be bathing their feet and put their stockings on. There was a bucket of some substance; there was water in it, and there was also opium in it. I did not taste it, but I smelled it. I don't know of anything besides opium that will make the smell of opium. I stirred the contents of that, with a stick I found there, that night, to see what was on the bottom of it. I don't know what Officer Toland did. I did not see him doing that. I did not see anybody but myself go to that bucket. So far as I noticed nobody went to that bucket excepting myself. Anybody else in the party assisting in that arrest could have examined that

(Testimony of George W. Desmond.)

bucket and I would not have seen them, because I was busy taking this opium down. There was a piece of red cloth over there, just hung down over the shelves behind this [37] bunk where the little woman was, that I found this stuff behind. There was some shelf there, because I caught, I think, three cans of opium off those shelves, so they certainly were there. There were two doors to that room, the door that I entered, and as I looked toward the right of the room, I could have seen the little bunk that the little woman, Lo Kuen, was on; and there were some curtains hanging down at the foot of that bunk. As I stood in the door I entered, I could not see the second door from that bunk until I walked up in front of the bunk. That second door was a door that connected with an adjoining room, apparently. And that door was set back some inches, I don't know how far. I really don't remember that it set back far enough so that a board had been placed down below the top of that bunk, and on that board was setting some of these packages. I don't remember that. I see these two marble pillars, and I see the set-in in back. Assuming that these marble pillars and that piece along the top represented the woodwork that was around that door as it was back of the bunk, that door would represent just about where that smooth marble is,—the door itself. And this bed was up about the way this table was, against the edge of that door; that is right. I don't remember that in back and down below, about eight or ten inches, was a board that had been placed between the two side

(Testimony of George W. Desmond.)

posts. It was possible to lie on that bed and reach up and touch anything you found. You would have to reach up. I do not know, I cannot testify that you could lie on that bed and put your hand over and feel, even with the bed, any of those packages. I don't know whether there was a board there or not. I know the shelves were just in back of the bed there, [38] but the exact location so far as inches go, I could not testify to. I don't think it is a fact that the shelves I found most of the opium on would be on the top of what those marble pillars would represent, if they represented the sides of the door; I don't think it was up that high. A curtain was over a shelf there, about three or four feet up, I guess it was. That shelf was in front of the door, the shelf where I found the opium. I don't recollect of a shelf being underneath the bunk. I don't think I found anything under either bunk. The first I saw of this trunk was after I started to handle the opium over to Mr. Enlow, the trunk was in the center of the floor. If it was there when I came in, I didn't notice it. We got these suitcases or boxes from under the bunks when we were going to take the stuff out, when we got the opium all on the floor ready to take it out. I found no opium under any of the bunks. I was the only one who searched behind the bunk where Lo Kuen was. That night I handled everything that came from the back of the bunk where Lo Kuen was. I examined the bunk that Lo Kuen was on. I did not find anything, opium or pipe, in that bunk. I found no indication of Lo Kuen using any opium or

(Testimony of George W. Desmond.)

smoking any there in that bunk. I didn't find any opium or pipe on her, but I believe there was a pipe found on one of the women when they were searched later on. I was the only one of the searching party who took charge of that side of the room where the bunk was that Lo Kuen was found on. I made what I thought was a thorough search. I don't remember how many gas lights were there burning when I went in the room; I don't remember where the gas was located in the room. I don't remember whether it was a side jet or a pendant jet from the center. The room was pretty well lighted. I was standing on the corner of Washington and [39] Grant Avenue at the time that Mr. Enlow and Mr. Toland came to ask me to go up there. I don't remember whether I had been up on Stockton street between Jackson and Pacific that evening. We had been all over the district. I had no occasion to observe these premises that evening before I went up there with Enlow, no more than I would any other building. I have no recollection as to lights or what the condition of the building was. Mr. Enlow and Mr. Toland didn't say anything about where we were going, except we were going up on Stockton street some place, until we got directly opposite 1137. They walked over and said, "This is the place." I think I went up first. Mr. Enlow and Officer Meehan followed. I think Mr. Toland was outside; if he came up he didn't stay very long; yes, he did come up—I wish to correct myself, he came up and as soon as we located the room he left and went outside. I had no trouble in opening the out-

(Testimony of George W. Desmond.)

side door, or going into that little passage-way between rooms 1 and 2. After we passed that door going to rooms 1 and 2 we smelled the opium then. In the hallway I detected it slightly. I don't remember the exact width of the hallway that is between rooms 1 and 2. I paid no attention to any of the dimensions, and I have not been in the place since, so I could not tell anything about it. When I arrived there, I knocked on room 2. I said, "This is the police squad"; there was some response in Chinese; then an interval elapsed until I knocked on room 1 and a man came out, a Chinese, who started to act as interpreter. After he carried on some conversation in Chinese with the woman inside, I started to climb up onto the door knob, to look over the transom. About five minutes expired from the time I knocked on the door until that happened. As I looked through the transom, Ng Choy Fung was standing [40] in the room, right inside the door, on the floor, so I could see her. She was not near the stove; she was near the door. I don't know the dimensions of the room. I don't remember where the stove was. I know there was a gas plate in there, but I don't remember the exact location. I believe there was a washstand on the north side. The bucket was over in the northeast corner; the bucket was not very near the gas range, the bucket was to the north and to the east. I don't remember how many chairs there were in the room. From that west wall I took down the biggest part of the whole seizure. I was not able, myself, to know what was in those packages until I

(Testimony of George W. Desmond.)

tore the covers open. I had an idea what it was, but I did not know for sure. As soon as I felt the package, I knew what it was. I tore open the packages and looked to make sure, but I knew they were opium cans. As they stood on the shelves I could not tell what was in them. All of the packages I took were tied up in about the shape and size of a brick. I have not the least idea about how many of those packages I took. I know it was the biggest part of the seizure. I think I filled up a suitcase or two. I am not sure whether I filled up one suitcase or two suitcases. Mr. Enlow packed them in. I know there were a great number of them. I don't know how many. I spoke to the defendants after I got into the room. I didn't have much to say to them. Later on the little one, Lo Kuen, said she wanted to go home, but didn't say where she lived. She said that after we were pretty near ready to go away from there. During this transaction she said she wanted to go home. I don't remember her saying anything about Commercial Street. If I testified before Commissioner Krull, that she said she wanted to go home and I asked her where she lived and she said on Commercial Street, I guess [41] that is right because my mind was more refreshed at that time than it is now. I recollect now anyway that she said she wanted to go home.

**Testimony of John Toland, for the Government.
(Recalled).**

JOHN TOLAND, a witness recalled on behalf of the United States, testified as follows:

Q. (By Mr. THOMAS.) Mr. Toland, do you know about what the price of opium was per can at the time of this seizure?

Mr. COOK.—Objected to as immaterial and incompetent.

The COURT.—The objection is overruled.

Mr. COOK.—Exception.

A. Between fifty and \$60 a can. It was nearer 60 than 50. There was not any water splashed on the floor around that bucket. It is clear in my mind as to the situation of the bunk or bench upon which Lo Kuen was lying, and the shelves behind it. The arrangement was—you came in the door,—the bunk that Le Kuen was lying on, that these other officers said she was on, she was not there when I came in, was to the right of the door as you came in the room. There was a door in that wall, through that wall, leading to the next room; the door was set in as any ordinary door and the bunk was along that. I saw Officer Desmond pulling these packages from behind that bunk, evidently coming from that space. I saw him bringing them right out from the top of the bed, not above, but right out from behind the bed; there was a space there of 6 inches. It was not as deep as the space behind those pillars. It was more like the insert on that smooth marble where the fruits and vegetables are shown. I think those are 4-inch walls,

(Testimony of John Toland.)

and it would be about 5 or 6 inches possibly. It was not what you would call a deep recess in [42] there. It was just a slight recess. That door was closed; I think it was locked. We didn't look in the other room; it might have been barred from the other side. There were other shelves. I should judge the one lower down was about 3 feet and the other one was about 14 inches. All of that opium was not on the shelf 3 feet above; some of it was in back of the bed. All of the cans of opium I saw there on the first night of that seizure were in about the same condition; they were not at all clean; there were some of them that had opium on the outside; some had patches on like that one you see setting on top there, looking like sticking plaster; a lot of them had that on the different places around the cans where they evidently had been leaking. Some of them looked like they had been cleaned up and others looked as though they had not been. There was not any opium inside the trunk; there was an empty carton inside the trunk and a lot of papers. I don't recollect the exact spot where the opium cans which had not been patched and cleaned were. I know there were some such in the seizure. In that room, which was small, 10 or 12 by 14, there were two policemen, Mr. Enlow and myself and the two women and the two beds turned upside down and so there was not much space—you couldn't see everything. It was a small room. I don't recollect the exact spot where the cleaned cans were found.

(Testimony of John Toland.)

Cross-examination.

On cross-examination, the witness testified :

The shelving that was behind the bunk that Lo Kuen was found on was put up on the ordinary brackets that the Chinese use, screwed to the wall; they were not affixed to the door, nor to the side of the door. The shelves were longer than the door was wide, and the shelving was fastened [43] to the wall, not to the jamb of the door, according to my recollection. They came out from the wall and beyond the inset of the door. They had a red curtain over them. They were covered up by a red curtain, just as Mr. Desmond has spoken of, the curtain was hanging from the top shelf. That curtain did not extend down to the top of the bunk. Mr. Desmond was leaning over the bunk and falling down behind and pulling these things out. I did not see how far he had to put his hand down. Presuming this to be the top of the bed he was with his knees right on the bed reaching right over; the first I would see of the package would be when he brought it up over the edge of the bed. It came from somewhere here, but how far down I don't know. I would say these packages are in the exact condition they were in at the time the seizure was made; some of them we opened and some we did not. I cannot now tell whether that package had clean cans or tins. I don't know how many I opened of those. We opened maybe a dozen packages. I think they all looked approximately like those tins now shown me, substantially so, according to my recollection.

**Testimony of E. E. Enlow, for the Government
(Recalled).**

E. E. ENLOW, a witness recalled for the United States, testified as follows:

There were no other persons in room 2 at 1137 Stockton Street than the two women defendants when the officers went into the room. It was not possible to use this door, that had the shelf in front of it, as an exit from that room, because before we could get in this room we had gotten in the room to the rear of this, and thought we could get in that way, but it was nailed or locked; we could not do it. [44]

Cross-examination.

On cross-examination, the witness testified:

I have just testified right now that that door was either nailed or locked. While we were waiting we went around the large hall and came around to this room and tried to get in that way. I don't know the number of that room. I think Mr. Desmond opened that door from the hallway and we went in. There was not a light in there. I don't know the number of the room. I believe Mr. Desmond unlocked the door with one of his pass-keys. I think Mr. Mehan was with us, perhaps Mr. Toland, I don't know. I don't remember whether that was just a minute before or a minute after we had called the Chinaman to interpret for us. I don't remember. I do not remember whether there was a knob on the door between the two rooms, room 2 and the room that that other door led to. I say it was either locked or nailed because it was fast. It may be a fact that I

(Testimony of E. E. Enlow.)

did not make any close observation, simply found that I could not open it with the doorknob; I know that we made some effort to get through there; we didn't want to do any damage but we came back and tried it. From the other room I saw the lock and bolt there, from room 2. Yesterday I saw a lock and bolt on the inside of that door in room 2 that was behind the bunk. At the time of the arrest I don't remember what it was, but I remember that it was fastened. I don't remember whether or not we tried Desmond's pass-key on that door; we may have done that; we made some effort to open that door and could not. I remember that there was a bunk against that door and the doorway there was stacked practically full of opium. [45]

Testimony of Lo Kuen, for Defendant.

LO KUEN, one of the defendant, being first duly sworn, testified as follows:

I don't remember if I have heard Mr. Jones, this interpreter translate from Chinese into English before. I know some of this interpreter's Chinese. I first met Ng Choy Fung three days before I was arrested, on Jackson Street. I intended to go to the Movies. I had come along and saw a woman on the street and I walked a little faster, she had fallen down on the street, and I saw a man helping her. And I asked her what was the matter. She said she had fallen down on the street. She said, "I am very tired and I am not well." She said that her head became dazed and she fell down. Then I asked her, "Now, you are so tired that you fell down,"—I

(Testimony of Lo Kuen.)

asked to go with her. Then she asked me, because she could not walk very well, would I escort her home. I asked her where she lives; she said on Stockton Street. The place she fell down was on Jackson Street, near Stockton. I went with her to Stockton Street. I had never been there before. She said she lived in the Jung Wah building. I went with her to her room. I escorted her there, asked her where she lived, and she said on the second story. She opened the door and I didn't see where the door opened into. Then she asked me, "Won't you please open it for me?" I tried to open it but it would not open. A man from the next room came there to us and he opened the door and asked what was the matter. I see that man in the courtroom now. He is Lee Kum. He opened the hall door. Choy Fung asked me to open the door into her room; she gave me the key and showed me which key would open the door. I had never been up there to that room [46] before that night. I talked with Lee Kum at that time. I had never seen that Chinese before that night when he opened the door for us. After I got in Choy Fung's room, she said, "I thank you very much for having escorted me home." Then she asked me what my surname was. I answered that my name was Lo Kuen; then she told me that she was very much obliged that I had brought her there. She asked me where my place was and thanked me. I made some tea and stayed there until quite late. I went home to my place afterwards. I live on Commercial Street, 687, that is between Kearny and Montgomery

(Testimony of Lo Kuen.)

Streets. I went back to Ng Choy Fung's room again at 9 o'clock the next day, to sweep the floor and to make some tea for her. She had requested me to come back. I stayed until about 11 or 12 o'clock that night. I went home that night again. I went to Ng Choy Fung's up on Stockton Street on the day I was arrested about 9 o'clock. She asked me to go out on the street about 6 or 7 o'clock on the evening of the day I was arrested, to get some medicine, some medicine made in the form of tea. I did. I went to Ah Wah Tong's drug-store on Jackson Street; I don't know the number. Before I went for the medicine that night, I heard somebody about that time knock on Ng Choy Fung's door. I did not see who it was. I heard somebody call out, "Choy Fung, Choy Fung" and knocking on the door at the same time, but I didn't see who it was. She told me to stay awhile and to come back in two or three hours. I got back there to the room that evening about 7 or 8. The kind of medicine I got at the drug-store was the filling of a prescription. When I came back in the room after getting the medicine Ng Choy Fung and I boiled the medicine again, on the stove in the room. [47] I don't remember the time these officers came up that night. I remember being arrested. Before the men came in the room and arrested us, we were washing or bathing. I don't know anything about opium around that room, before I was arrested or on the shelves. I was going to this room of Ng Choy Fung's after the first time I met her because she has asked me to come and make tea for her and cook for

(Testimony of Lo Kuen.)

her, and so on. That was the only reason that took me to that room.

Cross-examination.

On cross-examination, the witness testified :

I have lived at 687 Commercial street over a year. No one lives in the same room with me. My husband was not there. Sometimes I did sewing for a living, sometimes I nursed. The last time I worked before I picked up Ng Choy Fung on the street was two or three months. After I went to room 2 at 1137 Stockton Street, the kind of work I did there for Ng Choy Fung was cooking and boiling the medicine and sweeping the floor and taking care of her. I cooked the first evening I went there. I cooked tea and the medicine. I asked her if I should cook her any rice and she said no she didn't want any. I cooked some food for her the first night I was there. I cooked on the stove. The rice was in an iron concern, on the floor, just at the opening, as you open the door. On that night I swept the floor and attended to her getting more tea and took care of her in that way. There was a broom there. I didn't do any dusting that night. I didn't sleep in her bed at all the first night I went there. I did not take a bath in that room that night. I went home between 11 and 12 that night. I went alone. I did not leave anybody with Ng Choy Fung. She was sick, very sick, not able to get up. The next morning I got there about 9 o'clock. I [48] knocked at the door and she opened the door for me. When I left the room the night before to go home I don't remem-

(Testimony of Lo Kuen.)

ber who locked the door. I had no key other than my own. She gave me a key when I went out at 6 o'clock at that time, on the night of the arrest. I did not have a key before that; when I went back I pounded at the door. I had my own keys, one bunch. They were in my pocket when I was arrested. I did not have a key for room 2 in my bunch at the time I was arrested. When I had it I kept it in my pocket. After we got to the courthouse they took it away from me. At the courthouse they took away from me the key belonging to Choy Fung and the bunch of keys belonging to me. I don't know how many, because I had some that I had no use for on that bunch. I don't know how many I had of keys I had no use for on that bunch. I never got those keys back. She gave me a bunch of three keys, she showed me that one was for the street and one for the hall door and the other for the room. When I was arrested I had not returned those keys, they were on my own person. On the second day that I was there at Ng Choy Fung's place, I just cooked and made tea and swept the floor. I cooked rice and I helped her to wash her face. I don't remember that I did any washing that day. The second day I went home about the same time, about 11 or 12 o'clock. Ng Fung was very sick the second day. She didn't get up. I did not occupy either of the beds on the second day. I went out of the room on the second day, between the time I went there in the morning and the time I went home at night, to get some medicine and to buy the food, excluding the

(Testimony of Lo Kuen.)

rice. I don't remember all the details of what was cooked that day. There was rice cooked. When I went out on that day I pulled [49] the door to. When I came back, I pounded on the door and she opened it. She might have been up at some other time that day for a few minutes; she was about as sick that day as she was before. When I went home that night I pulled the door to. I went back to room 2 where Ng Choy Fung was on the third day, the day I was arrested, about 9 o'clock. That day I did just the same, I helped her to cook and to sweep the floor and to cook the tea. Ng Choy Fung got up that day. I was sick that day; I had a headache. When the officers came in I had been lying down on the bed just a short time while she was washing herself. Just before that I had been boiling water for her to wash with, and also made tea. I saw an opium pipe there in the room. I have seen her taking opium. I didn't see where she got it from. I did not see any opium around there. Two days I saw her smoking. I did not get any opium for her to smoke. I don't know whose trunk that was. Ng Choy Fung took her bath at the wash-bowl, a very small distance from the stove, about a foot.

Testimony of Lee Kum, for Defendant.

LEE KUM, a witness called on behalf of the defendants, being first duly sworn, testified as follows:

I live in Room No. 1, at 1137 Stockton Street, San Francisco. I have lived there about two years. My business is white shirt store, ladies' underwear. My place of business is on Stockton Street, between

(Testimony of Lee Kum.)

Broadway and Pacific. It is the next block below from where I live. I am a man of family. My wife and little son and daughter occupy the room where I live. I don't know the defendant, Ng Choy Fung, the old lady, I don't know her name. I don't know whether or not prior to her arrest she was living in room 2 at 1137 Stockton [50] Street. I have seen her there. The first time I ever saw the little woman Lo Kuen there was three days before she was arrested. About 8 o'clock or so I saw her coming home with that other woman that is alongside of her there. She was very much excited and wanted me to open the door, the second door, I do not mean the door from the hallway into the little hall between rooms one and two. I unlocked the door for them. I had never seen that little woman, Lo Kuen up there before that time, when I assisted her to open the door. It was about one year before that night that I had seen the other woman living in that room. I saw Lo Kuen the next morning about 9 or 10, carrying a slop-bucket from room 2 into the back part of the building. I was in my own room on the night that these two women were arrested. I heard the commissioners striking the door. They asked me to come and open the door. The commissioner asked the woman to open the door; she said she was taking a bath; she spoke in Chinese. The commissioner asked me to tell her to open the door and I told her to open the door. She said, "I am taking a bath, in a moment," that is, soon. She opened the door soon after I spoke to her in Chinese. I saw these

(Testimony of Lee Kum.)

four men up there, the commissioners, that night. Before she opened the door, they looked over the transom into my room and asked me to open the door, and for me to come and ask the other room people to open the door. I understand that there is an outside door from the hallway that opens into a little hallway between room 1 and room 2. When the commissioners came up they were in that middle portion, that middle square, the little hallway in front of my room and room 2 before they climbed up to the transom and called for me to come out. [51] They asked me when they came in there and they called upon me over the transom and then I started and they asked me to call on the woman and ask her to open the door, and I called upon her to open the door, and then the woman answered, "I am taking a bath." Then the commissioner said "Hurry, hurry"; then she opened the door; then I did not see what they did. I saw these gentlemen, Mr. Enlow, Mr. Toland, Mr. Desmond and Mr. Mehan up there that night. I saw him (pointing to Mr. Toland) go there to that other room. He went out alone. I have never been into room 2 where these two women were arrested.

Cross-examination.

On cross-examination, the witness testified: The first time I ever saw Ng Choy Fung at room 2 was about one year. I don't know what she was doing there; I have simply seen her going in and out of there. I did not see her every day, only very seldom. Sometimes I would see her in the hallway. Some-

(Testimony of Lee Kum.)

times I didn't see her as often as once a week. I did not talk with her; simply saluted one another. She never went into my room. The last time I saw her before the day that I saw her come up there with her friend was several weeks. The time I saw her with the little woman on Tuesday night was the first time I had seen her for, well, may be about two weeks and some days. I did not pay very much attention to her. I was not interested in what she was doing. I didn't know where she lived the two weeks before I saw her on Tuesday night. Two weeks previous to when she was sick is when I saw her before. I don't know whether she was there or not during those two weeks; that is, from the time I saw her up to the Tuesday [52] night when I saw her with the young woman. I don't know whether or not the young woman was there during those two weeks. When I saw Lo Kuen in the hall she had just an ordinary water bucket of galvanized iron, white iron.

Redirect Examination.

On redirect examination the witness testified, as follows:

The old lady came home about three days before she was arrested, and that is the time that this little woman came home with her when she came home sick.

Testimony of Lee Hong, for Defendant.

LEE HONG, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

I speak English. The first time I ever saw the defendants was on August 10th, 1915. I was walk-

(Testimony of Lee Hong.)

ing up Jackson Street to go to the Republic Cigar-stores and on the other side of the sidewalk I saw the old lady fall down and I thought she would get up herself but in a second she did not get up and I ran over to the other side, on the sidewalk, and helped her up. She had a little square package in her hand when she fell down on the street. The little lady picked that up. The small lady was not walking with the old lady at the time old lady fell down. The small lady was walking up Jackson Street about that far ahead (indicating); I helped the old lady up and the small lady helped on the other side. The small lady asked the old lady, "What is the matter?" and she said, "Oh, I am very sick." Then the small lady asked the old lady where she lived and the old lady said, "Not very far, up on Stockton Street." Then [53] she took the old lady home. I just saw them walk up Jackson Street towards Stockton Street and I just left them. The Republic Cigar store is on the other side of Jackson Street to that on which the old lady fell. It is near Jackson and Stockton Streets. This happened around 8 o'clock in the evening. I did not see the defendants after that until after they were arrested. I had not seen either of them before that time. I didn't know their names.

Cross-examination.

On cross-examination, the witness testified as follows:

I didn't tell nobody about picking this old lady up. I never saw the old lady after that. The

(Testimony of Lee Hong.)

gentleman told me to come up here. I was in the Republic cigar store that day and a white man said, "An old lady fell down on the other side of the sidewalk, who knows it; I said, "I have seen it" and then he told me to come down here. I had never seen either of these women before.

Redirect Examination.

On redirect examination, the witness testified as follows:

I have a plaster on my neck now; I had it on on the night that I helped these women up. I remember Mr. Wallenstein coming up to the cigar store and inquiring about a man who had a plaster on his neck. My business is a cook.

Mr. COOK.—I would like to recall Lo Kuen with the interpreter, again; she claims that some of her answers were not interpreted in full.

Testimony of Lo Kuen, for Defendant (Recalled).

LO KUEN, recalled, on behalf of defendants, testified as follows: [54]

On the night, about 5 or 6 o'clock, just before Ng Choy Fung asked me to go out and get some medicine, somebody had come there and knocked at the door and asked that I should go out to the street, that is, that I should go out. Some man who came and knocked at the door asked that. I don't know who he was that asked me to open the door; he called "Choy Fung"; that is all I now. I don't know whether it was a white man or a Chinaman. I went to open the door and Choy Fung told me not to open

(Testimony of Lo Kuen.)

it, and she went to open it. She went out and spoke with this person for a few minutes. I don't know what; then Choy Fung came in, and then she told me to go out and get the medicine. She had talked a few minutes with this man and then came in and told me to go. At the time the man knocked at the door I was washing the dishes. I didn't see the person at all, but just heard a voice calling, "Choy Fung." It sounded like a Chinaman's voice.

Cross-examination.

On cross-examination, witness testified, as follows:

Mr. THOMAS.—Q. Did you give the testimony which you have just given, to the interpreter when you were on the stand awhile ago?

A. I answered before.

When I went out of the door I did not see a man there in the hall. I did not see a man on the steps. The man said, "Choy Fung some." "Some" means Auntie, "Auntie Choy Fung." I did not hear this man talking to Choy Fung. She went out and pulled the door to and went to the man.

Testimony of Ng Choy Fung, for Defendants.

NG CHOY FUNG, one of the defendants, being first duly sworn, testified as follows: [55]

The first time I ever met this little woman, Lo Kuen, I went to Chun Sing Tungs for medicine and I fell down on Jackson Street on the way back. After I fell down there was a man picked me up. Then this young lady came and she got hold of me by

(Testimony of Ng Choy Fung.)

the arm. I thanked the gentleman. I don't know who he was. Then this young lady took me home. I opened the door myself. I tried to open the door but I was unable to; then she took hold of my key and opened it herself. There was a man there brought me along. That man there lives in the next room to room 2; I knew him but I have not seen him for awhile. After Lo Kuen helped me home that night, she came back. She did not stay all night. About five or six o'clock the night I was arrested there was a man came to look for me. He came and knocked at the door, and I told Lo Kuen not to open the door. I went and opened the door myself. When he came there I thought he was coming there for opium. Lo Kuen went after the tea, that is, after the medicine. She came back again about eight or nine o'clock. I was sick, and when she came there I had given her the key, and went to sleep. Then I asked her to make the medicine. Then I saw the condition that I was sweating, and I told her to boil some water for me to wash my body with. Then after she had rubbed my body, I told her not to go, to wait a while. You see, I was feeling quite sick, and I asked her not to go away. I told her to lie down a while on the bed. When the police officers knocked on my door before I was arrested I was rubbing my body. I said for them to wait until I had my clothes on, that for a woman to appear without clothes was not proper. Lo Kuen could not see any opium like this in that room at any time; [56] it was no concern of hers.

(Testimony of Ng Choy Fung.)

The man brought this stuff into that room where I was. I didn't know when the man—when I had gone out to get some medicine, I came back, and I was not aware that a man had come, and I didn't know really that he had brought the opium. He never mentioned it to me, what it was at the time. On the night of my arrest, about five or six o'clock, after I sent Lo Kuen out, that man appeared in my room. They were two men that had brought the opium. They were Chinese. The name of one was Ah Kwai—I don't know what his surname was. I don't know where he is now. After the advertising was made by the custom-house officers he got away and I have not seen him since. There was one white man that had very big whiskers. There was a Chinaman that had a moustache; that was a man who came to buy opium; I don't know whether he came to buy it or sell it; I don't know which. That night after I sent Lo Kuen out there were two whites that carried the opium; they were probably like expressmen or something. That is what I made them out to be. There were two men came that night after Lo Kuen went out after the medicine or tea as I have translated it. One of these men was a Chinaman with a moustache. There were no talk between them; they brought their scales there with them. There was a man that had a moustache and he wanted opium. The one that had the moustache wanted opium, and they brought out two—I said that this was not the place to sell opium, for them to take it out somewhere else to be sold. I said to them I

(Testimony of Ng Choy Fung.)

would not have it sold here, they could take it out somewhere else to sell. Then they had a quarrel there. I opened the door for them to go out and they did not return. Ah Kwai, I had seen him formerly, he is a sailor; at the time [57] of the earthquake I had gone into the country on a farm; then I met him after I came back to San Francisco again on Stockton Street; then he called me by name, Ng Choy Fung, but I did not recognize him. He said, "Are you living here?" and I said, "Yes." He asked if I had opium, and I said, "Yes, I have." He then asked me if I lived here and I said, "Yes." He says, "I want to go and sit down awhile." Then I said, he being a friend, invited him in. Then he went out. Then the next morning early he came back and then he knocked at the door, and then he asked for Ng Choy Fung and I answered that I was Choy Fung, and I wondered why somebody came there to look for me, and I asked him who he was looking for, and he said, "I want to see you awhile." Then I asked him what he wanted to see me for. Then he said, "You open the door." Then I said, "No, I can't open the door for you. Tell me what you want." Then he just kept knocking. Then I opened the door for him. Then I asked "What is it about?" Then he said "Don't make a noise." Then I asked, "What have you come for?" and he said, "Don't make a noise." Then I said, "What is it, tell me what it is." Then he brought the opium. He said that a man on the floor above had promised to carry the opium to the place and he said that he

(Testimony of Ng Choy Fung.)

had promised the night before that he would bring opium in the morning, that this party would take it, not to my place, but to his place, to take the opium not to my place but to his place. Then he was not able to get into the room above and he brought it to mine. That was Monday, in the morning, before the arrest. This opium was no concern of Lo Kuen's at all. I was the only one. As to how the opium got under the floor there, under that linoleum, when he brought it that time, it was not a few but he had a whole lot of stuff; he put the [58] whole business down near the bed and put some on the shelves. I said, "I use that bed for sleeping, you couldn't have it there." The men that brought the opium were two white people. The boy wanted to have the opium at my bed, and I says, "No, you cannot have it there." I don't know anything about that hole where the opium was. That place did not belong to me. Ah Quai was the name of the man that came and knocked at the door about 5 or 6 o'clock in the evening of the day I was arrested, and I asked Lo Kuen to go out. I don't know where Ah Quai lives. Before the earthquake I knew him. He is a Chinese; we called him "Uncle Ah Quai." Before the earthquake he lived in Spanish Alley (Spofford Alley). Before the earthquake he told me that he lived in Spofford Alley, but I do not know what work he did. I don't know what work he is doing now, I have been to the potato ranch, so I don't know. He is not so tall as the interpreter here, between 40 and 50 years of age. The man that came

(Testimony of Ng Choy Fung.)

with him had a moustache but he didn't have a moustache; the one that came didn't know whether he came to buy or to sell. I don't know the name of the man that came with him. They had gone when Lo Kuen went out the door; not very long after Lo Kuen went out they came back. Ah Quai and the man with the moustache came in; I don't know but they brought scales; they got into a quarrel and they left the scales and then went away. The man that carried the opium in was a white man but the man that came with Ah Quai, with the moustache, was a Chinaman. I had not sent for those men that night. I didn't know those people. I was farming and I didn't know them. I didn't know they were opium men when they came to the door on the night that I was arrested when Lo Kuen was [59] out; I would not have opened the door if I had known. They knocked at the door and I thought that they were coming to get the opium, and so I opened the door. They brought the opium on Monday morning, about 8 or 9 o'clock may be, previous to this night. I don't know whether the men who brought the opium had a wagon or not. I met Ah Quai on Sunday on the stairway when I went out for medicine. It was on Monday they brought the opium. It was Ah Quai that knocked on the door on Monday; then I opened the door and said, "I have not seen you for a long time, I have been farming." I thought it was a friend that was bringing a doctor; I had been sick, so I opened the door, and instead of that it was opium he had.

(Testimony of Ng Choy Fung.)

There were two white men and Ah Quai. One of the white men was a tall man with very much whiskers; the other was a young man in his 'teens. I don't know their names. I had never seen them before; I didn't know them at all. Ah Quai told me the opium was for the place upstairs, and they could not get an entrance there, and so they wanted me to leave it here a little while. I don't know who the man upstairs was. Ah Quai did not say anything to me about opium when I saw him on the street on Sunday. I didn't give Ah Quai or the white man any money for the opium they brought on Monday. They did not give me any money. All they said was, "Just leave it there a little while and we will take it out." They brought the opium in this trunk, they emptied the trunk and then they put the opium in different places; that is, they put some up on the shelves. They took the trunk away until the day that I was arrested, then they brought it back. I did not tell Dr. Gardiner in Mr. Tidwell's office the day after I was arrested that I paid \$200 for all that [60] opium. He asked me if I smoked opium and I said I had smoked about \$200 worth. I did not tell Dr. Gardiner in Mr. Tidwell's office that a white man sold me all of that opium, very much—for \$200. I smoke opium myself, and I was talking about my own smoking. I don't know the family name of Ah Quai. Altogether it was three times Ah Quai called into my room during that week. If you were counting when he came without any opium then it was four times. Sunday when I

(Testimony of Ng Choy Fung.)

met him on the steps was the first time; the next morning when he brought the opium was the next time; when he came with that other man, the time that I sent Lo Kuen out, it was the third time. I would not let him come in the third time. Before I was in room No. 7. In September, 1914, I went in room 2 to live, the front room because I was so sick. Nobody lived there with me before Lo Kuen was there. I am not quite certain whether it was September, 1914, or not, but from the time going into that room until Lo Kuen came there to stay with me I was alone. I cooked in the room. I paid the rent. I paid for the gas. Ah Ping occupied room 2 before I did. I don't know what his first name is. In January, 1915, I was at the ranch, at the first camp, Bacon Island. It is near Stockton. In February, 1915, I was at the ranch. In March, 1915, I came back and was sick several months. I could not tell you exactly which month it was that I came back to San Francisco. I have been very sick since I came back. I came back from the ranch either the 4th or 5th month. I come back because I was sick and I rent that room. I stayed in that room from the 9th month when I got in there (September, 1914) until the 4th or 5th month of this year. I slept in that room. Over the holidays I was away. In the [61] 11th month I went away *I went away* for the holidays and this year in the 4th month I came back again, and I was there until I was arrested. I do not know whether or not anybody occupied the room, stayed in the room, when I was not

(Testimony of Ng Choy Fung.)

there. During the holidays I had the keys all the time, for the room was mine. I got the money to pay the rent from September, 1914, to August the 12th of this year on the ranch, from the man there. It was my own money that rented the room. My husband gave me the money. Chun Wah Yee is my husband's name; he is in the country farming; he has never been to that room. I did not stay in that room during January, 1915, I was not there until in the first month.

Mr. THOMAS.—Q. I show you a bunch of nine gas bills made out to See Ping, 1137 Stockton Street, room 2, running from September 18, 1914, to June 16, 1915, and ask you if those are the gas bills that you paid for that room for gas used there?

A. You are asking me a question; I don't know letters and so of course I cannot tell you whether those are they *are* not.

They gave me a receipt for gas bills that I paid, for half a dollar each month.

Thereupon the bunch of nine gas bills were introduced in evidence and marked "U. S. Exhibit 2."

Continuing the witness testified:

I said there was a quarrel between these men in the room before the arrest; the quarrel was about the opium; Ah Quai wanted him to pay money and no money was forthcoming; I did not take any part in the quarrel, I wanted them to take the stuff out. The man with the moustache wanted to take some opium out and the other man, Ah Quai, would not let him [62] take it out without paying some money to him for it.

**Testimony of John E. Gardiner, for the Government
(in Rebuttal).**

JOHN E. GARDINER, a witness called on behalf of the United States in rebuttal, being first duly sworn, testified as follows:

I recognize the defendant, Ng Choy Fung. I interpreted in Mr. Tidwell's office while she was being interrogated. She made a statement to me during that interrogation as to the price of the opium that was found in her room. She said \$200. She said she bought it from a tall white man with lots of whiskers, who spoke Chinese and who was a kind of a seafaring man. She said this tall white man brought in a great big sack and looked her up and would like to get rid of it, sell it to her, and that inasmuch as she was a smoker of opium herself she bought it, she bought the whole of it. She said she bought it very cheap, and the reason was that it was comparatively poor opium.

Cross-examination.

On cross-examination, the witness testified as follows:

I have been present in court since Mr. Jones has been interpreting here for this party. I had no difficulty in translating for her at all. Mr. Jones is correct as to the tense of Chinese verbs; Chinese tense depends on the context. We can indicate time just as well in Chinese as we can in English. The verb is qualified by an adverb. The investigation, as I recall it, was started by Mr. Tidwell; Mr. Enlow came in and also asked a few questions, and I think

(Testimony of John E. Gardiner.)

occasionally Mr. Toland. As I remember it, Mr. Tidwell asked [63] the particular question I am referring to. I did not make any memorandum at the time of my translation. I am testifying now simply from my recollection of that interview which is very clear. I did not make any note of the questions and the answers that were asked and given. I did not soon after that make any summary or memorandum of any kind. I do not know whether any was made at that time in my presence by Mr. Tidwell, or anyone else. My experience has been that there is no more ambiguity to Chinese language than there is to English, especially in a case of this kind where the question as to who brought the opium there was asked not once but several times; and especially also the question was asked, did any Chinese have anything to do with that opium and the answer was none whatever. That circumstance I shall never forget as long as I live. I heard Mr. Jones translate. I tried to follow Mr. Jones' translation very closely, and I was very much surprised at the end of it how well Mr. Jones interpreted it. In translating in the Chinese, you hear a sentence in Chinese, and if you have sufficient knowledge of Chinese and English you translate that into English with the same meaning, not literally word for word. I will illustrate that. If a Frenchman said "Comme vous portez vous," in English you would say as a translator, "How do you do." You would not say "How do you carry yourself" because that would be absurd in English. There was no attorney present

(Testimony of John E. Gardiner.)

at this interview that I know of. As far as I know there was not. I cannot tell if the defendants had conferred with anybody at that time outside of the officers. She was called into the room where I was interpreting, and I interpreted for them. Whether she used opium herself was asked or she volunteered [64] it. She said she used opium herself. One of the officers asked, when she said she bought that for her own consumption, how long do you think that amount of opium would last you, and she said, "Oh, a very short time." That opium was not in her presence at the time, and pointed out, it was in the next room, in full view, the doors were open. I don't know that they took several kinds of opium out of the room. When I put my question the reference was to the lot, her attention was directed to it; as I recall it everything was opened up; I recall also that one of the newspaper reporters suggested taking a photograph of it and have it in the papers because it was such a big amount. That was in another room, but the door was open between. I could see the opium from where I stood, and she was alongside of me so that she could see it. She should have seen it. Whether she had in her mind the amount of opium which she bought for her own use I don't know, except from the fact that her attention was called to the opium and she had previously stated that she had bought it from the white man.

Memorandum Relative to Testimony and Evidence.

The foregoing contains a correct statement of all the testimony given in the case, and all evidence, documentary or oral, offered in the case. [65]

Instructions of the Court to the Jury.

Thereupon, after argument to the jury by counsel, the Court instructed the jury as follows:

It is charged in the indictment that the defendants Ng Choy and Lo Kuen, did on or about the 12th day of August, 1915, in violation of the Act of February 9th, 1909, as amended January 17, 1914, at San Francisco, in this State and District, then and there wilfully, unlawfully, fraudulently and knowingly receive, conceal and facilitate the transportation and concealment after importation, of certain opium, to wit, six hundred and sixty (660) five-tael cans of opium prepared for smoking purposes, which as they, the said defendants and each of them then and there well knew, had been imported into the United States contrary to law. The indictment herein gives rise to no presumption against either defendant, and such indictment is not evidence or proof, and must not be considered or treated as such, or acted upon by the jury as evidence or proof. The defendants can only be convicted if at all, of the precise crime set out in the indictment, and although you may be satisfied that the defendants have been guilty of other offenses, yet they cannot be convicted of the crime set out in the indictment unless the evidence proves to you that they are guilty of that particular crime.

The act under which this prosecution is had is as follows: "That after the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any prepara-

tion or [66] derivative thereof; Provided, That opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, under regulations which the secretary of the treasury is hereby authorized to prescribe, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law ”

“Sec. 2. That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, or (and this is the portion with which we are here concerned) shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be punished,—as provided. Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury.”

“Sec. 3. That on and after July first, nineteen hundred and thirteen, all smoking opium or opium prepared for smoking found within the United States shall be presumed to have been imported after the first day of April, nineteen hundred and nine,

and the burden of proof shall be on the claimant or the accused to rebut such presumption.” [67]

These provisions are made a part of the law because of the difficulty of proving guilty knowledge, and render it necessary only that the Government prove that the defendants had after July 1st, 1913, smoking opium in their possession, when the presumption at once arises that it had been imported after April 1st, 1909—and such possession imputes to the defendants a guilty knowledge sufficient to warrant a conviction, unless the defendants shall explain such possession to your satisfaction. If therefore you are satisfied from the evidence beyond a reasonable doubt that defendants did have possession of this opium, and that it was smoking opium, then such possession will be sufficient to warrant a conviction, unless the defendants have explained such possession to your satisfaction.

The defendants are presumed to be innocent, and this presumption has the weight and the effect of evidence in their behalf, and it continues to operate in their favor until it is overcome by competent evidence; if the evidence introduced in this case does not overcome this presumption of innocence to your satisfaction, to a moral certainty, and beyond all reasonable doubt, you must find the defendants not guilty. But this presumption must be considered by you in connection with the presumptions created by the statute which has been read to you. It is not necessary for the defendants to prove their innocence but the burden rests upon the prosecution to establish every element of the crime with which they

are charged, and every element of the crime must be established to a moral certainty, and beyond all reasonable doubt. If the prosecution fails to establish to a moral certainty and beyond all reasonable doubt any one element of [68] the crime with which the defendants are charged, and which it is necessary to establish, in order to convict, or if there remains in the minds of the jurors a reasonable doubt as to whether or not the prosecution has established any element constituting the crime to a moral certainty, and beyond a reasonable doubt, then you must find the defendants not guilty. Mere probabilities or suspicions are not sufficient to warrant a conviction, nor is it sufficient if upon the doctrine of chance it is more probable that the defendants are guilty than innocent. If the evidence leaves it uncertain which of two or more inferences from the fact proven is the true inference you must adduce that inference which is most favorable to the defendant, and if after considering all the evidence in this case you are able to conscientiously reconcile such evidence upon any reasonable theory consistent with the defendants' innocence, you should do so. You are the exclusive judges of the weight of the evidence and credibility of the witnesses; and under your oaths, as jurors, you may take into consideration only such evidence as has been admitted by the court, and you should in obedience to your oaths disregard and discard from your minds every impression or idea suggested by questions asked by counsel which were objected to, and which objections were sustained. The defendants are to be tried on the evidence before

you and not on suspicions which may have been excited by questions of counsel, answers to which are not permitted.

Where a defendant takes the witness-stand, her evidence is to be judged by the same rules which are to be applied in determining the credibility of any other witness. That is, she is not to be discredited merely upon the ground [69] that she is the defendant. You are to accord her the same fair and impartial consideration of her evidence, when viewed in the light of all the other facts in the case as you would the testimony of any other witness standing in any other relation to the case. You cannot find the defendants guilty of any offense alleged in the indictment except upon the specific kind of opium as described in the indictment. You should consider the evidence in this case and apply it as though each of the defendants were being separately tried, and you are not to indulge in any inference or presumption against either of the defendants because she is being jointly tried with the other defendant. Although you might find from the evidence that the defendant, Ng Choy Fung, has been, or is, a user of opium, you are not to indulge in any inference or presumption against her as establishing in any way her guilt of any offense charged in the indictment. If the jury find that defendant Ng Choy Fung received the opium into her room, knowing it was smoking opium that had theretofore been imported contrary to law, and permitted it to remain there, the jury will be warranted in finding that in so doing she did receive and conceal, and facilitate the con-

cealment of such opium as charged in the indictment. If you find from the evidence that the defendant Lo Kuen was merely present in the room where the defendants were arrested as a nurse or attendant of the defendant Ng Choy Fung, and that she had no dominion over the room or the contents thereof, and had nothing to do with its presence there, or if you have any reasonable doubt of these facts, you should find her not guilty.

While before you can find a defendant guilty of the charge alleged in the indictment, the evidence must satisfy you [70] as to his guilt beyond a reasonable doubt, yet this does not mean that the Government must prove its case to an unassailable demonstration. The term reasonable doubt means just what its language imports. To be a reasonable doubt it must be based upon reason. There is hardly anything relating to human affairs that is not open to some possible or fanciful or imaginary doubt. Mere possible or fanciful or imaginary doubts are not reasonable doubts. But a reasonable doubt is defined to be that state of the case which, after an entire comparison of all the evidence, leaves the minds of the jury in that condition that they cannot say that they have an abiding conviction to a moral certainty of the truth of the charge.

It requires the concurrence of all of you to agree upon a verdict, and if you so agree you will have such verdict signed by your foreman and returned into court.

Thereupon, the jury retired to deliberate upon a verdict, and subsequently returned into court and

rendered a verdict of not guilty as to the defendant Lo Kuen and a verdict of guilty as to the defendant Ng Choy Fung. [71]

**Presentation of Bill of Exceptions, Notice Thereof,
and Stipulation for Settlement and Allowance.**

The defendant Ng Choy Fung hereby presents the foregoing as her proposed Bill of Exceptions herein and respectfully asks that the same may be allowed.

GEO. J. HATFIELD,

Attorney for Defendant Ng Choy Fung.

To John W. Preston, United States District Attorney, and to M. A. Thomas, Esq., and Mrs. Annette A. Adams, Assistant United States Attorneys:

Gentlemen:

YOU WILL PLEASE TAKE NOTICE that the foregoing constitutes and is the proposed Bill of Exceptions of the Defendant NG CHOY FUNG in the above-entitled action, and that said defendant will ask the allowance of the same.

GEO. J. HATFIELD,

Attorney for Defendant Ng Choy Fung.

IT IS HEREBY STIPULATED that the foregoing Bill of Exceptions is correct and that the same may be settled and allowed by the Court.

GEO. J. HATFIELD,

Attorney for Defendant Ng Choy Fung.

Service by receipt of copy hereby admitted this Feb. 19, 1916.

JNO. W. PRESTON,

U. S. Atty.

[Endorsed]: Lodged Feb. 19, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. Filed by Order of Court, June 23, 1916. W. B. Maling Clerk. By Lyle S. Morris, Deputy Clerk. [72]

*In the District Court of the United States in and for
the Northern District of California, First Division.*

No. 5779.

THE UNITED STATES OF AMERICA,

vs.

NG CHOY FUNG and LO KUEN.

Verdict.

We, the jury, find Ng Choy Fung, the defendant at the bar, Guilty.

H. E. LELAND,

Foreman.

[Endorsed]: Filed Dec. 22, 1915, at 4 o'clock P. M. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [73]

*In the District Court of the United States, for the
Northern District of California, First Division.*

No. 5779.

THE UNITED STATES OF AMERICA,

vs.

NG CHOY FUNG.

Judgment on Verdict of Guilty.

Convicted violation act February 9, 1909, as amended
by Act of January 17, 1914.

M. A. Thomas, Esq., Assistant United States Attorney, and the defendant, in her own proper person and with her counsel Wm. H. Cook, Esq., came into court. The defendant was duly informed by the Court of the nature of the Indictment filed on the 27th day of September, A. D. 1915, charging her with the crime of receiving, concealing and facilitating transportation and concealment after importation of 660 five-*tael* cans of opium; of her arraignment and plea of Not Guilty; of her trial and the verdict of the jury on the 22d day of December, A. D. 1915, to wit: "We, the Jury find Ng Choy Fung, the defendant at the bar Guilty. H. E. Leonard, Foreman."

The defendant was then asked if she had any legal cause to show why judgment should not be entered herein, and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion for new trial, thereupon the Court rendered its judgment:

THAT WHEREAS, the said Ng Choy Fung having been duly convicted in this court of the crime of receiving, concealing and facilitating transportation and concealment after importation of 660 five-*tael* cans of opium:

IT IS THEREFORE ORDERED AND ADJUDGED that the said Ng Choy Fung be imprisoned in the county jail, city and county of San Francisco, California, for the period of one (1) year.

Judgment entered this 3d day of January, A. D. 1916.

W. B. MALING,
Clerk.

By C. W. Calbreath,
Deputy Clerk.

Entered in Vol. 6, Judg., and Decrees, at page 437.
[74]

*In the District Court of the United States in and for
the Northern District of California, First Division.*

No. 5779.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NG CHOY FONG and LO KUEN,

Defendants.

Petition for Writ of Error.

Your petitioner, Ng Choy Fong, defendant in the above-entitled cause, brings this her petition for a Writ of Error to the District Court of the United States, in and for the Northern District of California, First Division, and in that behalf your petitioner says:

That on the 3d day of January, 1916, there was made, given, rendered and entered in the above-entitled court and cause a judgment against your petitioner wherein and whereby your petitioner said Ng Choy Fong, was adjudged and sentenced to imprisonment for one (1) year in the county jail

of the city and county of San Francisco, State of California; and your petitioner says that she is advised by counsel, and she avers that there was and is manifest error in the records and proceedings had in such cause, and in the making, giving, rendition and entry of such judgment and sentence, to the great injury and damage of your petitioner; all of which error will be more fully made to appear by an examination of the said record and by an examination of the bill of exceptions by your petitioner tendered and filed, and in the assignment of errors hereinafter set out, and to that end thereafter that the said judgment, sentence and proceedings may be reviewed by the United States Circuit Court of Appeals for the Ninth Circuit, your petitioner now prays that a writ of error may be issued and directed [75] therefrom to the said District Court of the United States, in and for the Northern District of California, First Division, returnable according to law and the practice of the Court, and that there may be directed to be returned, pursuant thereto, a true copy of the record, bill of exceptions, assignment of errors and all proceedings had in said cause; that the same may be removed unto the United States Circuit Court of Appeals, for the Ninth Circuit, to the end that the error, if any has happened, may be duly corrected, and full and speedy justice done your petitioner.

And your petitioner now makes the assignment of errors attached hereto, upon which she will rely, and which will be made to appear by return of the said record, in obedience to the said writ.

WHEREFORE, your petitioner prays the issuance of a writ, as herein prayed, and prays that the assignment of errors annexed hereto may be considered as her assignment of errors upon the writ, and that the judgment rendered in this cause may be reversed and held for naught, and that said cause be remanded for further proceedings, and that she be awarded a supersedeas upon said judgment, and all necessary process, including bail.

Dated this 15th day of January, 1916.

NG CHOY FONG.

GEORGE J. HATFIELD,

Attorney for Defendant.

[Endorsed]: Filed Jan. 15, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [76]

*In the District Court of the United States in and for
the Northern District of California, First Division.*

No. 5779.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

NG CHOY FONG and LO KUEN.

Defendants.

**Assignment of Errors on Writ of Error of Defendant
Ng Choy Fong.**

Now comes Ng Choy Fong, defendant in the above-entitled cause and plaintiff in error herein, and makes and files the following assignments of error

upon which she will rely in the prosecution of her Writ of Error in the above-entitled cause:

I.

That the verdict of the jury is contrary to law in that there is no evidence in the case that the defendant ever willfully, unlawfully, knowingly or feloniously received and concealed and facilitated the transportation after importation of six hundred and sixty (660) five-tael cans of, or any opium prepared for smoking purposes;

II.

That the verdict of the jury is contrary to law in that there is no evidence in the case that the defendant ever knew that the opium which she had in her possession had been imported into the United States, contrary to law;

III.

That the verdict of the jury is contrary to law in that there is no evidence in the case that the opium in the possession of the [77] defendant had been imported into the United States contrary to law;

IV.

That the Court erred in charging the jury: "The act under which this prosecution is had is as follows: 'That after the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof: Provided, That opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, under regulations which the Secretary of the Treasurer is

hereby authorized to prescribe, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law.'

'Sec. 2. That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, and opium or any preparation or derivative thereof contrary to law, or (and this is the portion with which we are here concerned) shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be punished,—as provided. Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury.'

'Sec. 3. That on and after July first, nineteen hundred and thirteen, all smoking opium or opium prepared for smoking found [78] within the United States shall be presumed to have been imported after the first day of April, nineteen hundred and nine, and the burden of proof shall be on the claimant or the accused to rebut such presumption.'

These provisions are made a part of the law because of the difficulty of proving guilty knowledge, and render it necessary only that the Government

prove that the defendants had after July 1st, 1913, smoking opium in their possession, when the presumption at once arises that it had been imported after April 1st, 1909,—and such possession imputes to the defendants a guilty knowledge sufficient to warrant a conviction, unless the defendants shall explain such possession to your satisfaction. If therefore you are satisfied from the evidence beyond a reasonable doubt that defendants did have possession of this opium, and that it was smoking opium, then such possession will be sufficient to warrant a conviction, unless the defendants have explained such possession to your satisfaction.”

V.

That the Court erred in admitting evidence in regard to the customs officers, E. E. Enlow and John Toland finding opium in small jars in room number 2 at 1137 Stockton Street, in the city and county of San Francisco, California.

VI.

That the Court erred in admitting evidence in regard to what the customs officers E. E. Enlow and John Toland found in said room the day following the arrest of the two defendants.

VII.

That the Court erred in pronouncing sentence against the defendant.

VIII.

That the Court erred in denying the motion of defendant Ng [79] Choy Fong for a new trial.

WHEREFORE, this defendant and plaintiff in

error prays that the judgment in said District Court may be reversed.

GEORGE J. HATFIELD,

Attorney for Defendant and Plaintiff in Error.

United States of America,
Northern District of California,
First Division,—ss.

I hereby certify that the foregoing assignments of error are made on behalf of the petitioner for a Writ of Error herein, and are in my opinion well taken and the same now constitute the assignments of error upon the Writ prayed for.

GEORGE J. HATFIELD,

Attorney for Defendant and Plaintiff in Error.

Receipt of copy of assignment of Error admitted this 15th day of Jan., 1916.

JNO. W. PRESTON,

U. S. Atty.

[Endorsed]: Filed Jan. 15, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [80]

*In the District Court of the United States in and for
the Northern District of California, First Division.*

No. 5779.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

NG CHOY FONG and LO KUEN.

Defendants.

Order Allowing Writ of Error and Supersedeas.

The writ of error and the supersedeas therein prayed for by the defendant Ng Choy Fong, pending the decision upon the writ of error, are hereby allowed, and defendant Ng Choy Fong is admitted to bail upon the writ of error in the sum of six thousand dollars (\$6000).

The bond for costs upon the writ of error is hereby fixed at the sum of two hundred fifty dollars (\$250).

Dated this 15th day of January, 1916.

M. T. DOOLING,

District Judge of the United States, for the Northern
District of California, First Division.

[Endorsed]: Filed Jan. 15, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [81]

Writ of Error (Copy).

UNITED STATES OF AMERICA,—ss.

The President of the United States of America.

To the Honorable, the Judges of the District
Court of the United States for the Northern
District of California, Greeting:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Ng Choy Fong, Plaintiff in Error, and United States of America, Defendant in Error, a manifest error hath happened, to the great damage of the said Ng Choy Fong, Plaintiff in Error, as by her complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the patries aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 31st day of August, in the year of our Lord one thousand nine hundred and sixteen.

[Seal]

W. B. MALING.

Clerk of the United States District Court, Northern District of California, First Division.

By C. W. Calbreath,
Deputy Clerk.

Allowed by

M. T. DOOLING,

United States District Judge. [82]

Service of the within Writ of Error by copy admitted this 31 day of August, 1916.

JNO. W. PRESTON,
Attorney for U. S.

[Endorsed]: Filed Aug. 30, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [83]

Citation (Copy).

UNITED STATES OF AMERICA,—ss.

The President of the United States, to United States
of America, John W. Preston, United States
District Attorney, Greeting:

You are hereby cited and admonished to be and
appear at a United States Circuit Court of Appeals
for the Ninth Circuit, to be holden at the city of
San Francisco, in the State of California, within
thirty days from the date hereof, pursuant to a
writ of error duly issued and now on file in the
clerk's office of the United States District Court for
the Northern District of California, First Division,
wherein Ng Choy Fung is plaintiff in error, and you
are defendant in error, to show cause, if any there
be, why the judgment rendered against the said
plaintiff in error, as in the said writ of error men-
tioned, should not be corrected, and why speedy jus-
tice should not be done to the parties in that behalf.

WITNESS, the Honorable MAURICE T. DOOL-
ING, Judge of the United States District Court of
the Northern District of California, this 31 day of
August, A. D. 1916.

M. T. DOOLING,

United States District Judge.

Service of the within Citation on W. of Error by
copy admitted this 31 day of August, 1916.

JNO. W. PRESTON,

Attorney for U. S.

[Endorsed]: Filed Aug. 31, 1916. W .B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [84]

*In the District Court of the United States for the
Northern District of California, First Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NG CHOY FUNG,

Defendant.

**Stipulation and Order Extending Time to February
5, 1916, to Serve Bill of Exceptions.**

It is hereby stipulated and agreed by and between
the respective parties hereto, that the time of the
defendant, Ng Choy Fung, in the above-entitled ac-
tion for serving her proposed Bill of Exceptions
upon the plaintiff herein may be, and the same is
hereby, extended and enlarged to and including the
5th day of February, 1916.

Dated San Francisco, Cal., January 5, 1916.

JNO. W. PRESTON,

By M. A. THOMAS,

Assistant United States District Attorney.

GEO. J. HATFIELD,

Attorney for Defendant.

So ordered.

Dated January 5, 1916.

M. T. DOOLING,

United States District Judge.

[Endorsed]: Filed Jan. 5, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [85]

*In the District Court of the United States for the
Northern District of California, First Division.*

UNITED STATES OF AMERICA,

Plaintiff,

vs.

NG CHOY FUNG,

Defendant.

**Stipulation and Order Extending Time to February
19, 1916, to Serve Bill of Exceptions.**

It is hereby stipulated and agreed by and between the respective parties hereto, that the time of the defendant, Ng Choy Fung, in the above-entitled action, for serving her proposed Bill of Exceptions upon the plaintiff herein, may be, and the same is hereby, extended and enlarged to and including the 19th day of February, 1916.

Dated San Francisco, Cal., February 5, 1916.

M. A. THOMAS,

Assistant United States District Attorney.

GEORGE J. HATFIELD,

Attorney for Defendant.

So ordered.

Dated February 5, 1916.

M. T. DOOLING,

United States District Judge.

[Endorsed]: Filed Feb. 5, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [86]

*In the District Court of the United States, in and
for the Northern District of California, First
Division.*

No. 5779.

UNITED STATES OF AMERICA,

Plaintiff,

VS.

NG. CHOY FUNG and LO KUEN,

Defendants.

**Stipulation and Order Continuing Time for
Settlement of Defendant's Bill of Exceptions to
and Into the March Term, 1916.**

IT IS HEREBY STIPULATED AND AGREED
by and between the respective parties hereto that the
time for the above-entitled court to settle the Bill of
Exceptions of defendant Ng Choy Fung, upon Writ
of Error herein, may be continued and extended
from the present November term, 1915, to and into
the next succeeding March term, 1916, of said court.

Dated at San Francisco, Cal., February 19, 1916.

JNO. W. PRESTON,

United States District Attorney.

GEO. J. HATFIELD,

Attorney Defendant and Plaintiff in Error.

Now, on this day, in the November term, 1915, pur-
suant to the above stipulation, and good cause ap-
pearing therefor, IT IS HEREBY ORDERED
that the time for this Court to settle the Bill of Ex-
ceptions of the defendant Ng Choy Fung, upon the
Writ of Error herein, be, and the same is, hereby

continued [87] and extended from the November term, 1915, to and into the next succeeding March term, 1916, of this court.

Dated at San Francisco, Cal., February 19, 1916.

M. T. DOOLING,
Judge of Said Court.

[Endorsed]: Filed Feb. 19, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [88]

**Certificate of Clerk U. S. District Court to
Transcript on Writ of Error.**

I, Walter B. Maling, Clerk of the District Court of the United States of America for the Northern District of California, do hereby certify that the foregoing 88 pages, numbered from 1 to 88, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of the United States of America vs. Ng Choy Fung, Number 5779, as the same now remain on file and of record in this office; said Transcript having been prepared pursuant to and in accordance with the "Praeceptum for Transcript" (a copy of which is embodied herein), and the instructions of the attorney for defendant and plaintiff in error.

I further certify that the costs for preparing and certifying the foregoing Transcript on Writ of Error is the sum of forty-eight dollars and sixty cents (\$48.60), and that the same has been paid to me by the attorney for the plaintiff in error herein.

Annexed hereto is the Original Citation on Writ of Error (page 92) and the Original Writ of Error

(page 90), with the return of the said District Court to said Writ of Error attached thereto (page 91).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 27 day of September, A. D. 1916.

[Seal]

WALTER B. MALING,

Clerk.

By T. L. Baldwin,
Deputy Clerk. [89]

Writ of Error (Original).

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Ng Choy Fung, plaintiff in error, and United States of America, defendant in error, a manifest error hath happened, to the great damage of the said Ng Choy Fong, plaintiff in error, as by her complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this

writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, the 31st day of August, in the year of our Lord one thousand nine hundred and sixteen.

[Seal] W. B. MALING,
Clerk of the United States District Court, Northern
District of California, First Division.
By C. W. Calbreath,
Deputy Clerk.

Allowed by:

M. T. DOOLING,
United States District Judge. [90]
Service of the within Writ of Error, by copy admitted this 31 day of Aug., 1916.

JOHN W. PRESTON,
Attorney for U. S.

[Endorsed]: No. 5779. United States District Court for the Northern District of California. Ng Choy Fong, Plaintiff in Error, vs. United States of America, Defendant in Error. Writ of Error. Filed Aug. 30, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

Return to Writ of Error.

The Answer of the Judges of the District Court of the United States of America, for the Northern District of California, to the within Writ of Error.

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this Writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals, for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this Writ was on the 25th day of September, A. D. 1916, duly lodged in the case in this Court for the within named defendant in error.

By the Court:

[Seal]

WALTER B. MALING,
Clerk, United States District Court, Northern District of California.

By T. L. BALDWIN,
Deputy Clerk.

CMT.

[91]

Citation on Writ of Error (Original).

UNITED STATES OF AMERICA,—ss.

The President of the United States, to United States of America, John W. Preston, United States District Attorney, Greeting:

You are hereby cited and admonished to be and

appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, First Division, wherein Ng Choy Fung, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable MAURICE T. DOOLING, Judge of the United States District Court of the Northern District of California, this 31 day of August, A. D. 1916.

M. T. DOOLING,

United States District Judge. [92]

Service of the within Citation on W. of Error by copy admitted this 31 day of Aug., 1916.

JOHN W. PRESTON,

Attorney for U. S.

[Endorsed]: No. 5779. United States District Court, for the Northern District of California. Ng Choy Fung, Plaintiff in Error, vs. United States of America, Defendant in Error. Citation on Writ of Error. Filed Aug. 31, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[Endorsed]: No. 2864. United States Circuit Court of Appeals for the Ninth Circuit. Ng Choy Fong, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the District Court of the United States for the Northern District of California, First Division.

Filed September 29, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

*In the United States Circuit Court of Appeals, in
and for the Ninth Circuit.*

NG CHOY FONG,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

**Stipulation and Order Enlarging Time to September
1, 1916, to File Record and Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the time of the plaintiff in error, Ng Choy Fong, herein for filing the record hereof, and docketing this case on Writ of Error, from the District Court of the United States, for the Northern District of California, First Division, to the United States Circuit Court of Appeals, for the Ninth Circuit, may be en-

larged to and including the 1st day of September, 1916.

Dated San Francisco, Cal., June 23d, 1916.

JOHN W. PRESTON,
United States District Attorney.
GEO. J. HATFIELD,
Attorney for Plaintiff in Error.

**Order Enlarging Time of Plaintiff in Error to File
Record and Docket Case.**

Now, on, this day, for good cause shown and pursuant to the foregoing stipulation, IT IS HEREBY ORDERED that the time for the plaintiff in error, Ng Choy Fong, for filing the record and docketing the case on Writ of Error from the District Court of the United States for the Northern District of California, First Division, to the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged to and including the 1st day of September, 1916.

Dated San Francisco, Cal., June 23, 1916.

WM. H. HUNT,
Judge.

[Endorsed]: In the *United States of Appeals*, in and for the Ninth Circuit. Ny Choy Fong, Plaintiff in Error, vs. United States of America, Defendant in Error. Stipulation Enlarging Time of Plaintiff in Error, Ng Choy Fong, to File Record and Docket Case. Filed June 23, 1916. F. D. Monekton, Clerk.

*In the United States Circuit Court of Appeals, in and
for the Ninth Circuit.*

NG CHOY FONG,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

**Stipulation and Order Enlarging Time to October
1, 1916, to File Record and Docket Cause.**

IT IS HEREBY STIPULATED AND AGREED by and between the respective parties hereto that the time of the plaintiff in error, Ng Choy Fong, herein for filing the record hereof, and docketing this case on Writ of Error, from the District Court of the United States, for the Northern District of California, First Division, to the United States Circuit Court of Appeals, for the Ninth Circuit, may be enlarged to and including the 1st day of October, 1916.

Dated San Francisco, Cal., August 30, 1916.

JOHN W. PRESTON,

United States District Attorney.

GEO. J. HATFIELD,

Attorney for Plaintiff in Error.

**Order Enlarging Time of Plaintiff in Error to File
Record and Docket Case.**

Now, on this day, for good cause shown and pursuant to the foregoing stipulation, IT IS HEREBY ORDERED that the time for the plaintiff in error,

Ng Choy Fong, for filing the record and docketing the case on Writ of Error from the District Court of the United States for the Northern District of California, First Division, to the United States Circuit Court of Appeals for the Ninth Circuit, be and the same is hereby enlarged to and including the 1st day of October, 1916.

Dated San Francisco, Cal., August 30, 1916.

M. T. DOOLING,
Judge.

[Endorsed]: 5779. In the United States District Court of Appeals in and for the Ninth Circuit. Ng Choy Fong, Plaintiff in Error, vs. United States of America, Defendant in Error. Stipulation Enlarging Time to File Record and Docket Case.

No. ——. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Oct. 1, 1916, to File Record thereof and to Docket Case. Filed Aug. 31, 1916. F. D. Monckton, Clerk.

No. 2864. United States Circuit Court of Appeals for the Ninth Circuit. Two Orders Under Rule 16 Enlarging Time to Oct. 1, 1916 to File Record thereof and to Docket Case. Refiled Sep. 29, 1916. F. D. Monckton, Clerk.

No. 2864

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NG CHOY FONG,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

GEORGE J. HATFIELD,

Attorney for Plaintiff in Error.

Filed this.....day of February, 1917.

FRANK D. MONCKTON, *Clerk.*

By.....*Deputy Clerk.*

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No. 2864

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NG CHOY FONG,

Plaintiff in Error,

VS.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

I. STATEMENT OF CASE AND SPECIFICATION OF ERROR RELIED ON.

The plaintiff in error (the defendant below) was convicted of a violation of the Act of February 9th, 1909, as amended January 17th, 1914. Specifically she was convicted of having on the 12th day of August, 1915, at San Francisco, concealed and facilitated the transportation and concealment after importation of 660 five-tael cans of opium prepared for smoking purposes, which she then and there well knew had been imported into the United States contrary to law.

At the trial the District Court instructed the jury in regard to the Act of February 9th, 1909,

under which the plaintiff in error was convicted. Plaintiff in error contends that the trial court erred in giving its instruction. Especially plaintiff in error relies upon the fourth specification of error set forth in the "Assignment of Errors on Writ of Error of Defendant Ng Choy Fong" as follows:

"That the Court erred in charging the jury: 'That act under which this prosecution is had is as follows: "That after the first day of April, nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof: Provided, That opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, under regulations which the Secretary of the Treasurer is hereby authorized to prescribe, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law.'

'Sec. 2. *That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, and opium or any preparation or derivative thereof contrary to law, or (and this is the portion with which we are here concerned) shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be punished,—as provided. Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof such possession shall be deemed suffi-*

cient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury.'

'Sec. 3. That on and after July first, nineteen hundred and thirteen, all smoking opium or opium prepared for smoking found (78) within the United States shall be presumed to have been imported after the first day of April, nineteen hundred and nine, and the burden of proof shall be on the claimant or the accused to rebut such presumption.'

These provisions are made a part of the law because of the difficulty of proving guilty knowledge, and render it necessary only that the Government prove that the defendants had after July 1st, 1913, smoking opium in their possession, when the presumption at once arises that it had been imported after April 1st, 1909,—and such possession imputed to the defendants a guilty knowledge sufficient to warrant a conviction, unless the defendants shall explain such possession to your satisfaction. If therefore you are satisfied from the evidence beyond a reasonable doubt that defendants did have possession of this opium, and that it was smoking opium, then such possession will be sufficient a warrant a conviction, unless the defendants have explained such possession to your satisfaction.' " (Italics here and elsewhere ours.) (Transcript of Record, pages 89-91.)

Plaintiff in error contends that the trial court erred in giving that portion of the instruction which is above italicized. In short it is the contention of plaintiff in error that that portion of the Act of February 9th, 1909, which provides that all smoking opium found within the United States shall be presumed to have been imported after

April 1st, 1909, and that possession of such opinion shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession satisfactorily, is unconstitutional and void as being violative of Article V of the Amendments to the Constitution of the United States.

This article provides that "no person * * * "shall be compelled in any criminal case to be a "witness against himself; nor deprived of * * * "liberty * * * without due process of law." Plaintiff in error contends that the Act of February 9th, 1909, in raising the presumption that any smoking opium found in the United States was imported after April 1st, 1909, and making possession of such opium sufficient evidence to authorize conviction unless the defendant shall explain the possession to the jury's satisfaction, strips the defendant in a criminal prosecution under that act of the protection of the inviolable presumption of innocence guaranteed by "the due "process of law" clause and tends to compel the defendant to take the witness stand whether he wishes to or not, at the peril of being convicted of a crime not proved against him.

The Act of February 9th, 1909, in Section 1, provides that it shall be unlawful to import opium into the United States *after the first day of April, 1909.*

Section 2 of the Act provides that anyone who shall *fraudulently* or *knowingly* receive, conceal, or in any manner facilitate the transportation or con-

cealment of such opium (that is opium imported into the United States after the first day of April, 1909) shall be guilty of a violation of the Act and shall be punished by fine or imprisonment or both.

The essential elements of the crime defined by this Act are three:

(1) That the opium be imported into the United States after April first, 1909;

(2) That the defendant actually receive, conceal or in some manner facilitate in the transportation or concealment of such opium;

(3) That the defendant knows at the time the defendant commits the overt act that the opium was imported into the United States after April 1st, 1909.

There is absolutely not one iota of evidence in the case at bar that the 660 five-tael cans of opium found in the possession of plaintiff in error, Ng Choy Fong, or any of it, was imported into the United States after April 1st, 1909. Nor for that matter is there one shred of evidence that any of the opium was imported at all. For aught that appears in the record the opium may have been imported prior to April 1st, 1909, or it may have been produced in this country.

So too there was no evidence whatsoever as to the guilty knowledge of the defendant Ng Choy Fong. It does not appear that Ng Choy Fong knew whether the 660 five-tael cans were imported before or after the first of April, 1909. In fact

it does not appear that she knew whether the opium had been imported at all. Just as there was no evidence as to the nature of the opium in respect to whether it had been imported or produced in this country; just as there was no evidence as to the date of importation, if it was imported, so too there was no evidence as to any knowledge or belief on the part of Ng Choy Fong as to the importation or production of the 660 five-tael cans.

It is contended by defendant in error that it was not necessary for the prosecution to prove any more than that the plaintiff in error had smoking opium in her possession after the first of July, 1913. It argues that by Section 3 of the Act of February 9th, 1909, this opium would be presumed to have been imported after April 1st, 1909, and that by Section 2 possession of such opium would be sufficient evidence to authorize conviction unless the accused explain the possession to the satisfaction of the jury.

Plaintiff in error contends that mere proof that she had smoking opium in her possession after the first of July, 1913, is insufficient to justify a verdict of guilty of the crime charged against her. She contends that the prosecution must show not only that the opium she had was imported but that it was imported after the first of April, 1909; and further the prosecution may show that she had knowledge of these facts.

The crux of the case is this—

The prosecution contends that from possession of smoking opium the Act requires it to be presumed that the opium was imported, and imported after April 1, 1909, and that the one having possession had knowledge that it was imported after that date.

Plaintiff in error contends the Act is unconstitutional in raising these presumptions in that it deprives plaintiff in error of the presumption of innocence guaranteed by the due process clause and tends to force her to be a witness whether she wishes to or not.

II. THE ACT OF FEBRUARY 9th, 1909, VIOLATES THE PRESUMPTION OF INNOCENCE GUARANTEED BY THE "DUE PROCESS" CLAUSE OF THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, IN RAISING, FROM THE POSSESSION OF SMOKING OPIUM AFTER JULY 1st, 1913, THE PRESUMPTION THAT IT WAS IMPORTED AFTER APRIL 1st, 1909, AND THAT THE ONE HAVING POSSESSION HAD KNOWLEDGE THAT IT WAS IMPORTED AFTER JULY 1st, 1913.

It is a well established principle of law that one charged with a crime is presumed innocent until he is proved guilty beyond a reasonable doubt. As stated in *United States v. Richards*, 149 Federal, 443, at page 454:

“In determining the guilt or innocence of each defendant in this case, you must be convinced beyond a reasonable doubt that he has committed the offense or offenses charged

in order to convict him. Each and every fact necessary to constitute the offense must be so proven; that is, beyond a reasonable doubt. Until guilt is proven, there is an absolute presumption of innocence; and this presumption of innocence continues with the defendant throughout the trial, and stands as sufficient evidence in his favor until from the whole evidence you are satisfied beyond a reasonable doubt of his guilt."

Or, as stated by "Bradner on Evidence" at page 460:

"The presumption of innocence is not a mere phrase without meaning; it is in the nature of evidence for the defendant; it is irresistible as the heavens till overcome; it hovers over the prisoner as a guardian angel throughout the trial; it goes with every part and parcel of the evidence."

This presumption of innocence has always been one of the fundamental bases of the common law. It is not however confined to the common law, but existed as an axiomatic and elementary principle of other systems. No better treatment of this subject can be found than in the opinion of our present Chief Justice White, rendered on behalf of the Supreme Court of the United States in *Coffin v. United States*, 156 U. S. 432. He said in part, at pages 453 seq.:

"The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law."

It is stated as unquestioned in the text-books, and has been referred to as a matter of course in the decisions of this court and in the courts of the several States. (Citing authorities.)

Greenleaf traces this presumption to Deuteronomy, and quotes Mascardus De Probationibus to show that it was substantially embodied in the laws of Sparta and Athens. Greenl. Ev. part 5, section 29, note. Whether Greenleaf is correct or not in this view, there can be no question that the Roman law was pervaded with the results of this maxim of criminal administration, as the following extracts show:

‘Let all accusers understand that they are not to prefer charges unless they can be proven by proper witnesses or by conclusive documents, or by circumstantial evidence which amounts to indubitable proof and is clearer than day.’ Code, L. IV, T. XX, 1, 1. 25.

‘The noble (*divus*) Trajan wrote to Julius Frontonus that no man should be condemned on a criminal charge in his absence, because it was better to let the crime of a guilty person go unpunished than to condemn the innocent.’ Dig. L. XLVIII, Tit. 19, 1. 5.

‘In all cases of doubt, the most merciful construction of facts should be preferred.’ Dig. L. L, Tit. XVII, 1. 56.

‘In criminal cases the milder construction shall always be preserved.’ Dig. L. L, Tit. XVII, 1. 155, s. 2.

‘In cases of doubt it is no less just than it is safe to adopt the milder construction.’ Dig. L. L, Tit. XVII, 1. 192, s. 1.

Ammianus Marcellinus relates an anecdote of the Emperor Julian which illustrates the enforcement of this principle in the Roman law. Numerius, the governor of Narbonensis, was on trial before the Emperor, and, contrary to the usage in criminal cases, the trial

was public. Numerius contented himself with denying his guilt, and there was not sufficient proof against him. His adversary, Delphidius, 'a passionate man,' seeing that the failure of the accusation was inevitable, could not restrain himself, and exclaimed, 'Oh, illustrious Caesar! if it is sufficient to deny, what hereafter will become of the guilty?' to which Julian replied, 'If it suffices to accuse, what will become of the innocent?' *Rerum Gestarum*, L. XVIII, c. 1. The rule thus found in the Roman law was, along with many other fundamental and humane maxims of that system, preserved for mankind by the canon law. *Decretum Gratiani de Presumptionibus*, L. II, T. XXIII, c. 14, A. D. 1198; *Corpus Juris Canonici Hispani et Indici*, R. P. Murillo Velarde, Com. 1, L. II, n. 140. Exactly when this presumption was in precise words stated to be a part of the common law is involved in doubt. The writer of an able article in the *North American Review*, January, 1851, tracing the genesis of the principle, says that no express mention of the presumption of innocence can be found in the books of the common law earlier than the date of McNally's *Evidence* (1802). Whether this statement is correct is a matter of no moment, for there can be no doubt that, if the principle had not found formal expression in the common law writers at an earlier date, yet the practice which flowed from it has existed in the common law from the earliest time.

Fortescue says: 'Who, then, in England can be put to death unjustly for any crime? since he is allowed so many pleas and privileges in favor of life; none but his neighbors, men of honest and good repute, against whom he can have no probable cause of exception, can find the person accused guilty. Indeed, one would much rather that twenty guilty persons should

escape the punishment of death than that one innocent person should be condemned and suffer capitally.' *De Laudibus Legum Angliae*, Amos' translation, Cambridge, 1825.

Lord Hale (1678) says: 'In some cases presumptive evidence goes far to prove a person guilty, though there be no express proof of the fact to be committed by him, but then it must be very warily pressed, for it is better five guilty persons should escape unpunished than one innocent person should die.' 2 Hale P. C. 290. He further observes: 'And thus the reasons stand on both sides, and though these seem to be stronger than the former, yet in a case of this moment it is safest to hold that in practice, which hath least doubt and danger. *quod dubitas, ne faceris*. 1 Hale P. C. 24.

Blackstone (1753-1765) maintains that 'the law holds that it is better that ten guilty persons escape than that one innocent suffer.' 2 Bl. Com. c. 27, margin page 358, *ad finem*.

How fully the presumption of innocence had been evolved as a principle and applied at common law is shown in *McKinley's case* (1817), 33 St. Tr. 275, 506, where Lord Gillies says: 'It is impossible to look at it (a treasonable oath which it was alleged that McKinley had taken) without suspecting, and thinking it probable, it imports an obligation to commit a capital crime. That has been and is my impression. But the presumption in favor of innocence is not to be reargued by mere suspicion. I am sorry to see, in this information, that the public prosecutor treats this too lightly; he seems to think that the law entertains no such presumption of innocence. I cannot listen to this. I conceive that this presumption is to be found in every code of law which has reason, and religion, and humanity, for a foundation. It is a maxim which ought to be

inscribed in indelible characters in the heart of every judge and juryman; and I was happy to hear from Lord Hermand he is inclined to give full effect to it. To overturn this, there must be legal evidence of guilt, carrying home a decree of conviction short only of absolute certainty.' ”

This axiomatic and elementary principle, lying as stated by Chief Justice White, “at the foundation of the administration of our criminal law”, was at the time of the adoption of the Constitution of the United States and at the time of the adoption of the first ten amendments thereto—the American Bill of Rights—a fixed, essential and fundamental part of “the law of the land”. As stated by Chief Justice White, “it has existed in the common law from the earliest time”. It was one of those rights jealously and zealously guarded by the English in their contests with the crown. It was guaranteed by the 39th chapter of the Magna Charta of King John, providing that “No freeman shall be taken, or imprisoned, or disseised, or outlawed, or exiled, or any wise destroyed; nor shall any go upon him, nor send upon him, but by the lawful judgment of his peers *or by the law of the land*”. Again, in the reissues of the Great Charter under Henry the Third, (2 Hen. III A. D. 1217, and 9 Hen. III A. D. 1225), the presumption of innocence was guaranteed an accused by a similar provision. And in like manner this protection to the accused was guaranteed again and again by various English monarchs by assurances that no

one would be imprisoned except by trial conducted according to the "law of the land".

As the English forced charters and bills of rights and similar assurances from their sovereigns, in the formation of the United States and the adoption of our Constitution the people forced into the Constitution the ten amendments or the American Bill of Rights. As stated by McGehee "Due Process of Law" at pages 17 and 18:

"The first ten amendments to the Federal Constitution were a concession to the fears of a generation which had taken part in the Revolution. The struggle with England for rights, held to be the sacred inheritance of all free English subjects, had left the States and the people of the country keenly alive to the value of liberty and profoundly jealous and distrustful of centralized power. The feeling was widespread that under the Constitution as proposed the States were weakened and a place left for encroachments which might in time end in their absorption into the Federal Government. Under these circumstances ratification of the Constitution by the requisite number of States was secured only by an understanding that amendments would be adopted declaring the rights of the people and restricting the powers of the general government. In pursuance of this understanding a proposition to amend the Constitution was brought forward by Mr. Madison in the First Congress, and the first ten amendments were framed, and ratified by the requisite number of States in December, 1791."

As the Magna Charta, bills of rights, and similar assurances secured to the English a guaranty that no one should be imprisoned without a trial

conducted according to the "law of the land", so the Constitution of the United States in the Fifth Amendment thereto secures to the people of the United States a guaranty that no one shall be deprived of liberty without "due process of law". The same thing is comprehended by the terms "law of the land" and "due process of law". As stated by McGehee in his work above referred to,

"The equivalence of the two phrases, 'law of the land' and 'due process of law', assumed by Cooke, has been universally stated upon his authority by American courts, and has become an established rule of interpretation."

The guaranty of a trial according to "the law of the land" or by "due process of law" in regard to criminal proceedings secured to an accused as an inviolable right the benefit of those rules of the common law by which judicial trials are regulated. In so far as action by Congress is concerned the Fifth Amendment places this right beyond reach of legislative subversion and makes it a part of the paramount law.

One of the benefits or rights accorded an accused, as pointed out by Chief Justice White is that he shall be presumed innocent until proved guilty beyond a reasonable doubt. When Congress attempts to violate this presumption it attempts to deprive an accused of one of those benefits accorded by the common law and guaranteed by the "due process" clause. Consequently such an attempt on the part of Congress would be unconstitutional and void.

This principle was laid down at an early date by Judge Cooley. In his treatise on "Constitutional Limitations" he points out that an accused cannot be deprived of the benefit of the presumption of innocence by any action of the legislative authority. He says at star page 309:

"Perhaps the most important of the protections to personal liberty consists in the mode of trial which is secured to every person accused of crime. At the common law, accusations of felony were made in the form of an indictment by a grand jury; and this process is still retained in many of the States, while others have substituted in its stead an information filed by the prosecuting officer of the State or county. The mode of investigating the facts, however, is the same in all; and this is through a trial or jury, surrounded by certain safeguards which are a well understood part of the system, *and which the government cannot dispense with.*

First, we may mention that the humanity of our law always presumes an accused party innocent until he is proved to be guilty. This is a presumption which attends all the proceedings against him, from their initiation until they result in a verdict, which either finds the party guilty or converts the presumption of innocence into an adjudged fact."

In the case at bar the crime charged against plaintiff in error is that she knowingly concealed smoking opium imported into the United States after April 1st, 1909. According to the rules of common law, the benefits of which are guaranteed by the "due process" clause, she would be presumed innocent until proved guilty beyond a reasonable

doubt. But Congress attempts to say that if it be proved that plaintiff in error had smoking opium in her possession then it will be presumed that she is guilty—it will be presumed that the opium was imported and that it was imported after April first, 1909, and it will be further presumed that plaintiff in error had knowledge of these facts. If plaintiff in error does not wish to be convicted then she must show to the satisfaction of the jury that the opium was not imported or that it was imported before April 1st, 1909, or that she had no knowledge of when it was imported or where produced. In other words, Congress attempts to subvert the presumption of innocence, to deprive plaintiff in error of those benefits granted an accused by law, and guaranteed by the due process clause of the Fifth Amendment.

There are a number of instances in the books where legislative bodies have endeavored to violate the presumption of innocence on the part of the accused by raising, as in the case at bar, upon the establishment of certain facts presumptions of guilt against the accused.

In *Wynehamer v. The People*, 13 N. Y. (3 Kernan) 378-488, it appeared that Wynehamer, the defendant below, was convicted of selling intoxicating liquors contrary to the provisions of a statute of the State of New York entitled "An Act for the prevention of intemperance, pauperism and crime," (Laws of 1855, page 340). The Act did not prohibit the safekeeping of liquor or the giving

it away in a private family. It made the sale of it (except in a few exceptional instances) unlawful. Despite the fact that the ostensible force of the Act was directed against the sale of liquor, Section 17 of the Act provided that proof of delivery should be *prima facie* evidence of sale, and proof of sale should be sufficient to sustain an averment of an unlawful sale.

The court held this provision unconstitutional on the ground that it deprived a defendant of liberty without due process in that it violated the presumption of innocence guaranteed by the due process clause of the Constitution. Justice Selden, in rendering his concurring opinion, said in this behalf at pages 444 through 447:

“But a point of still greater interest arises upon the first branch of Section 17, which provides that, ‘upon the trial of any complaint commenced under any provision of this act, proof of the sale of liquor shall be sufficient to sustain an averment of an unlawful sale, and proof of delivery shall be *prima facie* evidence of sale.’ There are two classes of cases upon which this provision operates with great severity. Although the act does not prohibit the safe keeping of spirituous liquor or the giving it away in a private dwelling, yet by this clause the mere delivery is made *prima facie* evidence of an unlawful sale, without exception as to place. No one, therefore, can in his own house give a glass of wine to a friend, without thereby affording *prima facie* evidence to convict him of a misdemeanor. Other portions of the act purport to respect the sanctity of the private domicile of the citizen; but its innermost recesses are pene-

trated by this provision, and acts of mere kindness or courtesy are converted into proofs of guilt.

But the operation of the section upon another class is equally onerous; I mean the class of licensed vendors. Sections 2 and 3 expressly authorize certain persons to sell who are required to give ample security not to violate any provision of the act, and yet, by force of the clause in question, every sale they make affords *prima facie* evidence to convict them. The act presumes against the innocence of its own selected agent, and will not permit this presumption to be rebutted until such agent consents to make himself a witness in the case. This provision raises the vital question, as to the value of that clause in the constitution which secures to every man charged with crime a trial by 'due process of law.' The most important guarantees of individual right which our constitution affords are concentrated in this single phrase. As we have already seen, the expression, 'due process of law,' first appeared in a statute of Edward III. as a paraphrase of the words, 'by the law of the land,' *per legem terre* in Magna Charta; and from that day to this both forms of expression have been held to refer to the common law, as distinguished from statutory enactment. Sir Matthew Hale says: 'The common law is sometimes called, by way of eminence, *lex terre* as in the statute of Magna Charta (chap. 29), where certainly the common law is principally intended by those words *aut per legem terre*, as appears by the exposition thereof in several subsequent statutes, and particularly in the statute of 28 Edward III. (ch. 3), which is but an exposition and explanation of that statute'. (1 Hale's Hist. Com. Law, 128). Lord Cooke also, in his commentary upon Magna Charta, puts the same construction upon the words. (2 Ins., 45, 50.) The courts in

this country have held the same. Chief Justice Ruffin, speaking of this clause in the constitution of North Carolina, in the case of *Hoke v. Henderson* (4 Dev. 1), says that 'such legislative acts as profess in themselves directly to punish persons, or to deprive the citizen of his property, without trial before the judicial tribunals, and a decision upon the matter of right, as determined by the laws under which it vested, according to the course, mode and usage of the common law, as derived from our forefathers, are not effectually laws of the land for these purposes.' To the same effect is the language of Judge Bronson, in *Taylor v. Porter* (4 Hill, 140), where, in speaking of Section 1, art. 7, of the constitution of 1821, he says 'The meaning of the section, then, seems to be, that no member of the state shall be disfranchised, or deprived of any of his rights or privileges, unless the matter shall be adjudged against him, upon trial had according to the course of the common law.'

If this interpretation is correct, and it is sustained as well by history as by judicial authority, the clause in question was intended to secure to every citizen the benefit of those rules of the common law by which judicial trials are regulated, and to place them beyond the reach of legislative subversion. They are, indeed, virtually incorporated into the constitution itself, and made thereby a part of the paramount law. Trials, therefore, at least such as are criminal, are to be regulated and conducted, in their essential features, not by statutes, but by common law. This the constitution guarantees. Precisely how far the legislature may go, in changing the modes and forms of judicial proceeding, I shall not attempt to define; but I have no hesitation in saying that they cannot subvert that fundamental rule of justice which holds that every man shall be presumed innocent until he is

proved guilty. This rule will be found specifically incorporated into many of our state constitutions, and is one of those rules which, in our constitution, are compressed into the brief but significant phrase, 'due process of law.'

Can Section 17 be reconciled with this rule? It provides that, upon every prosecution under the act, proof of a sale of liquor shall sustain an averment of an unlawful sale, and proof of delivery shall be *prima facie* evidence of a sale. It is plain that at common law the legal presumption would be directly the reverse of that declared by the act. Where the common law would presume innocence, this act presumes guilt. Either the guarantee of a judicial trial, according to the course of the common law, is a nullity, or this provision is void. *But I am prepared to go further, and to hold that all those fundamental rules of evidence which, in England and in this country, have been generally deemed essential to the due administration of justice, and which have been acted upon and enforced by every court of common law for centuries, are placed by the constitution beyond the reach of legislation. They are but the rules which reason applies to the investigation of truth, and are of course in their nature unchangeable. If it does not follow that to determine what they are, as applicable to judicial proceedings, is a judicial and not a legislative power, still they must necessarily be included in the phrase, 'due process of law.'* If this be not the true interpretation of the constitution; if the legislature, in addition to declaring what acts and what intentions shall be criminal, can also dictate to courts and juries the evidence, and change the legal presumptions upon which they shall convict or acquit, there is no barrier to legislative despotism; and the separation of the legislative and judicial departments of the govern-

ment, the guarantee of trial by jury, and of a trial according to the course of the common law, have all failed to afford any substantial security to individual rights."

In *State v. Beswick*, 13 Rhode Island, 211, it appeared that General Assembly of Rhode Island (the legislative body of that state) had enacted a law prohibiting the keeping of liquors with intent to sell the same in that state and making a violation of the law a criminal offense. The law further provided that it was not necessary to prove an actual sale of liquor in any particular premises in order to establish that liquors were kept there for sale, but that the notorious character of any such premises or the notoriously bad or intemperate character of persons frequenting the same *or the keeping of implements or appurtenances usually appertaining to grog-shops or places where liquors are sold, shall be prima facie evidence that liquors are kept on such premises for the purpose of sale within the State.*

The court held that the provision in question was unconstitutional and void in that it violated the presumption of innocence guaranteed an accused by "the due process of law" clause. The court said in part at page 216 seq.:

"The question then is, whether a statute is constitutional which makes it the duty of a jury, empanelled to try a complaint for unlawfully keeping liquors for sale, to convict the accused upon simple proof that his place of business is notorious as a place where liquors are unlawfully kept for sale, or upon simple

proof that the place is frequented by persons of notoriously bad or intemperate character, or upon proof that he has there the implements and appurtenances of a grog-shop or tippling-shop, without more, unless there be other evidence to rebut or control it.

We have very carefully considered the question, and have come to the conclusion that the statute is not constitutional. It virtually strips the accused of the protection of the common law maxim, that every person is to be presumed innocent until he is proved guilty, which is recognized in the Constitution as a fundamental principle of jurisprudence. And we think it is repugnant to the constitutional provision that the accused shall not 'be deprived of life, liberty, or property, unless by the judgment of his peers of the law of the land.' What is meant by 'the judgment of his peers' is the judgment of a jury, and certainly the accused does not have the *judgment* of a jury, if the jury is compelled by an artificial rule to convict him, whether they think him guilty or not, upon proof of a fact which is consistent with his innocence, and which is so consistent with his innocence that proof of it at common law would not even be admissible against him. Suppose that the General Assembly were to enact that if any person were generally reputed to be guilty of a murder it should be *prima facie* evidence that he was guilty, and that some citizen were convicted and sentenced to death or imprisonment on such evidence, because in the absence of rebutting evidence the jury had no option to acquit him. Could it be said that his life or liberty had been taken from him by the *judgment* of his peers? We think not. The judgment of the jury would not have been taken on the question of his guilt, but only on the question whether or not he was generally reputed guilty. So under the statute here a man may be convicted of unlawfully keeping

intoxicating liquors for sale, upon proof that his place of business is generally reputed to be a liquor shop, without the jury's actually passing any judgment on the question of his guilt.

The provision is that the accused shall not be deprived of his life, liberty, or property, 'unless by the judgment of his peers *or* the law of the land.' It may be argued that even if the accused does not have the judgment of his peers he is nevertheless convicted by 'the law of the land.' This phrase has a historical origin. It was borrowed from *Magna Charta*, and, as has been repeatedly decided, means the same as 'due process of law.' The question then is, whether if a man is convicted on the testimony indicated, and under the rule prescribed by the statute, he is convicted according to 'due process of law.'

The answer to the question depends on the meaning of the phrases 'due process of law' and 'the law of the land.' The phrases have never received a perfectly satisfactory definition. One or the other of them occurs in all or nearly all the constitutions of the several States and in the Constitution of the United States, and it is well settled that the provisions in which they occur were intended to operate as limitations on the legislative power of the several States and of the United States. It follows, if the provision is a limitation on the legislative power, that a legislative enactment is not necessarily 'the law of the land,' even when it does not conflict with any other provision of the Constitution, and that a proceeding according to a legislative enactment is not necessarily 'the law of the land,' even when it does not conflict with any other provision of the Constitution, and that a proceeding according to a legislative enactment is not necessarily 'due process of law.' It is also settled that these provisions secure to every citizen, except

in the matter of taxation, a judicial trial before he can be deprived of life, liberty or property. The definition of 'due process of law' given by Judge Edwards in *Westervelt v. Gregg*, 12 N. Y. 202, 209, is quoted by Judge Cooley in his work on Constitutional Limitations, *355, with approval, and is in our opinion not only concise but very accurate. 'Due process of law undoubtedly means,' he says, 'in the due course of legal proceedings according to those rules and forms which have been established for the protection of private rights.' *The effect in criminal prosecutions is to secure to the accused, before condemnation, a judicial trial, if not strictly in all points according to the common law, at least not in violation of those fundamental rules and principles which have been established at common law for the protection of the subject or the citizen. Among these rules there is none which is more fundamental than the rule that every person shall be presumed innocent until he is proved guilty.* 'This rule,' said Judge Selden, in *The People v. Toynbee*, 2 Park. Cr. 490, 526, 'will be found specifically incorporated into many of our state constitutions, and is one of those rules which in our Constitution are compressed into the brief but significant phrase 'due process of law.' 'Indeed to hold that a legislature can create artificial presumptions of guilt from facts which are not only consistent with innocence, but which are not even a constituent part of the crime when committed, is to hold that it has the power to take away from a judicial trial, or at least substantially reduce in it, the very element which makes it judicial. To hold so is to hold that the legislature has power to bind and circumscribe the judgments of courts and juries in matters of fact, and in an important measure to predetermine their decisions and verdicts for them. It is true the accused has the right of defence left to him,

and may, if he can adduce satisfactory evidence, rebut the statutory presumptions; but the production of such evidence is not always easy, even with the right to testify in his own behalf; and the right to testify in his own behalf having been granted, can be abrogated, by the legislature. It is not one of those great and immemorial rights which lie embedded in the phrase 'the law of the land.'"

In *People v. Lyon*, 34 N. Y. Sup. Ct. Rep. (27 Hun) 180, it appeared that after the decision of the New York Court of Appeals in *Wynehamer v. People* (*supra*) that the Legislature enacted a new law regulating the sale of liquors. This law authorized the issuance of licenses for the sale of liquors in quantities less than five gallons but prohibited them to be drunk on the premises where sold. It further provided that "whenever any person is seen to drink in any such shop—any spirituous liquors or wines forbidden to be drunk therein, it shall be *prima facie* evidence that such spirituous liquors or wines were sold by the occupant of such premises, or his agent, with the intent that the same should be drunk therein".

The New York court held that the latter provision of the law was void and unconstitutional in that it attempted to deprive an accused of the benefit of the presumption of innocence. The court said in part, at page 182 seq.:

"In the present case the defendant is charged with having sold liquors with intent that they should be drunk on the premises. It is his right to have the question, whether he did

so or not, tried by a jury. That means that the jury are to determine, from their own judgment upon the facts legally given in evidence, whether or not the defendant is guilty. If the legislature can declare that a certain fact is *prima facie* evidence of the defendant's guilt, such a declaration means that the jury must convict, unless the defendant explains away this evidence; and if they can declare a fact to be *prima facie*, it would seem to follow that they might declare it conclusive evidence.

Undoubtedly in many instances, (very possibly in this instance,) drinking on the premises might take place under such circumstances that the jury, (and any sensible man,) would be satisfied that the liquor must have been sold by the defendant with intent, etc. And all the denial of the defendants might fail to overcome, in any fair mind, the weight of the circumstances. But this clause of the statute must stand, if at all, irrespective of any natural tendency in the fact of such drinking to convince a jury of the defendant's guilt. To illustrate, if the legislature can legally enact such a clause, they might enact that the drinking of liquors a mile distant from such a house, or shop, should be *prima facie* evidence of a sale in such house, or shop, with intent that the liquor so sold should be drunk on the premises. Or again; they might enact that if a dead body were found in any house, that should be *prima facie* evidence that the occupant of the house had murdered the deceased. Because the legislative enactment is merely arbitrary, and need have no regard to the connection, or want of connection, between the evidence and the conclusion which is to be proved.

It is urged on the part of the people that this clause of the statute is but analogous to certain common-law presumptions; such for instance as that the possession of recently

stolen property affords a presumption that the possessor is guilty of the larceny. (Wills' Circ. Ev., 53; *Knickerbocker v. People*, 43 N. Y. 177). But this presumption is only the natural inference which the jury may properly draw from circumstances with which the party accused is connected. (3 Greenl. Ev., Sec. 31.) On the contrary this clause of the statute declares a fact, with which the accused is not necessarily connected, to be *prima facie* evidence of an illegal act of the accused and of the intent with which it was done. Thus this clause comes within the condemnation expressly by Judge Selden, in *Wynehamer v. People* (13 N. Y., at pages 444 and seq.)

The learned judge who tried this case did not rest his charge on the presumption, which might arise from the circumstances under which these persons drank liquors in the water-closet, that the defendants must have sold the liquors with intent, etc. But he rested on this statute as making a rule of evidence applicable to these cases. And hence the question arises directly on the power of the legislature thus to control the effect of evidence on the minds of the jury.

In *State v. Beswick* (13 R. I. 211; 23 Alb. Law Jour. 487), a statute came up for discussion, which declared that the notorious character of the premises, or the bad character of persons frequenting them, should be *prima facie* evidence that liquors were kept there for sale. The court held that the statute was unconstitutional, as violating the provision that one should not be deprived of life, liberty or property except by the judgment of his peers or the law of the land. They held that the statute took away the right of the jury to pass judgment on the guilt of the accused. And, again, that to hold that the legislature could create artificial presumptions

of guilt was to take away from a judicial trial the very element which makes it judicial.”

In *State v. Divine*, 98 N. C. 778; 4 S. E. 477, it appeared that the Code of North Carolina, Section 2329, provided that whenever any livestock should be killed by the engine or cars on any railroad, and such killing is proved, it should be *prima facie* evidence of negligence in any indictment therefor against the conductor or engineer of the train which did the killing, or certain named officers of the railroad.

The Supreme Court of North Carolina held this provision unconstitutional in that it subverted the presumption of innocence, and thereby deprived the defendant of his liberty without due process of law. The court said in part, at 4 S. E., page 482:

“Looking at the indictment, it will be seen that the only material allegations are that the prosecutor’s cattle were killed by a running train on the road of the company of which the defendant is superintendent, without connecting him with the act, and scarcely more definite is the special verdict. Do these words impute crime? and upon mere proof of these facts is the charge established? and must the defendant be convicted unless he repels the negligence which the statute presumes in the subordinates in managing the train? The very question involves an answer, unless all the safeguards thrown around one accused of crime are disregarded, and he left without their protection. * * * Judge Cooley in his work on Constitutional Limitations, at page 309, referring to a trial for criminal offenses of different grades, uses this impressive language: ‘The mode of investigating the facts, however,

is the same in all, and this is through a trial by jury, surrounded by certain safeguards, which are a well understood part of the system, and which the government *cannot dispense with;*' meaning, as we understand, that the charge must go before the jury, and the guilt of the accused proved to them, with the presumption of innocence until this is done. In *Cummings v. Missouri*, 4 Wall. 328, Mr. Justice Field, referring to certain enactments in that state, says: 'The clauses in question subvert the presumption of innocence, and alter the rules of evidence which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable.' 'But I have no hesitation in saying', remarks Selden, J. in *Wynehamer v. People*, 13 N. Y. 446, 'that they (the legislature) cannot subvert that fundamental rule of justice which holds that every one shall be *presumed innocent until he is found guilty.*' "

In the matter of *Wong Hane*, 108 Cal. 680; 41 Pac. 693; 49 A. S. R. 138, the Supreme Court of the State of California reached a similar decision in regard to an ordinance of the City of Los Angeles declaring it unlawful for any person to have in his possession any lottery ticket unless it be shown that such possession is innocent or for a lawful purpose. The court held the ordinance unconstitutional and invalid in that it assumed to overthrow the presumption of innocence, saying in part at 108 Cal., page 682:

"The ordinance, however, throws upon the defendant the burden of proving his innocence, and by its terms, unless he shows that his possession is lawful or innocent, his mere posses-

sion of the ticket renders him liable to punishment. If there are any circumstances under which the possession of a lottery ticket may be lawful or innocent, a defendant who is charged with the offense of having such ticket in his possession is entitled to the presumption of innocence, and cannot be compelled to establish his innocence by affirmative proof. To the extent that the defendant is required to establish his innocence, the provisions of the ordinance violate his constitutional rights."

So too, the Supreme Court of Oregon, in *Ex parte Kameta*, 36 Ore. 251; 60 Pac. 394, held a similar ordinance of the City of Portland void in that it put on the defendant the burden of proving his innocence. The court said in part, at 60 Pac., page 395:

"The objection, however, that the ordinance in question is void because it assumes to overthrow the presumption of innocence, and put upon the defendant the burden of showing that his possession of lottery tickets is lawful or innocent, is well taken. Such an objection was held fatal to an ordinance quite identical in language with the one before us by the supreme court of California in *Re Wong Hane*, 108 Cal. 680, 41 Pac. 693, and the reasoning of the court in that case being, in our opinion, conclusive, renders unnecessary any further examination of the question by us. It follows, therefore, that the judgment of the court below must be affirmed, and it is so ordered."

Likewise this principle has found expression by the Supreme Court of the United States. In *Cummings v. Missouri*, 71 U. S. (4 Wall.) 277, at 328, Justice Field puts the Supreme Court on record in the following words:

“And this is not all. The clauses in question subvert the presumptions of innocence, and alter the rules of evidence, which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable. They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way—by an inquisition, in the form of an expurgatory oath, into the consciences of the parties.”

It is submitted that these authorities establish the proposition that a law making the proof of certain facts presumptive of the guilt of the accused, unless the accused disprove his guilt, is unconstitutional and void as depriving the accused of liberty without due process of law. The “due process clause” guarantees to an accused the benefits of a trial conducted according to the rules of common law. As pointed out by Chief Justice White, one of those benefits, recognized as axiomatic and elementary and lying at the foundation of our criminal procedure, is the presumption of innocence.

So the Act of February 9th, 1909, in making the possession of smoking opium presumptive of the guilt of the accused unless the accused explain that possession to the satisfaction of the jury is unconstitutional in that it subverts the presumption of innocence. The mere possession of smoking opium, without more, is not a crime. Neither is it necessarily an essential part of the crime. In fact no power exists in Congress to make the mere pos-

session of smoking opium a crime. That power belongs to the police power of the several states. The crime is the possession of smoking opium imported after April 1st, 1909, with knowledge that the opium was imported after that date. And Congress cannot make mere possession of smoking opium proof of that crime without changing the fundamental basic rules of criminal procedure rendered inviolable by the Fifth Amendment.

III. THE ACT OF FEBRUARY 9th, 1909, IN REQUIRING ONE FOUND IN THE POSSESSION OF SMOKING OPIUM TO PROVE TO THE SATISFACTION OF THE JURY THAT IT WAS NOT IMPORTED AFTER APRIL 1st, 1909, OR THAT THE POSSESSOR DID NOT HAVE KNOWLEDGE THAT IT WAS IMPORTED AFTER THAT DATE OR BE ADJUDGED GUILTY IS VIOLATIVE OF THE PROVISION OF THE FIFTH AMENDMENT THAT "NO PERSON SHALL * * * BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF."

The rule that one should not be compelled to be a witness in a criminal case against himself, said Mr. Justice Brown, in *Brown v. Walker*, 161 U. S. 591, at 596-7:

"had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which has long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688, and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, was not uncommon even in England. While the admissions or confes-

sions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton, and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English, as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment."

The Act of February 9th, 1909, makes it a crime for one to knowingly conceal opium imported into the United States after April 1st, 1909. Congress derives its power to pass this Act from the power to regulate commerce.

Brolan v. United States, 236 U. S. 216, 35
Sup. Ct. Rep. 285.

But the Act purports to go further than this. It purports to say to one found after July 1st, 1913, in the possession of smoking opium: "You explain to the satisfaction of the jury that this opium was not imported, or if it was imported that it was imported before April 1st, 1909, or that you didn't know that it was imported after April 1st, 1909, or you will be adjudged guilty". In other words, it attempts to say to one found in the possession of smoking opium: "You take the witness stand and explain your possession of this opium—whether it was imported or not, and when, if it was—or be adjudged guilty of knowingly concealing opium imported after April 1st, 1909". It attempts to force a defendant admittedly in the possession of smoking opium, to be a witness in a criminal proceeding against himself at the peril of being adjudged guilty of a crime not established against him.

Similar acts have been passed upon by Federal and State courts of this country. In *Boyd v. United States*, 116 U. S. 616; 6 Sup. Ct. Rep. 524; 29 L. ed. 746, the Supreme Court of the United States held that the Act of Congress of June 22nd, 1874, c. 391, Sec. 5 (18 Stat. L. 187) authorizing an order in revenue cases requiring the defendant or claimant therein to produce his private books, invoices, and papers, or else the allegations of the government's attorney will be taken as confessed, was void as violating the provisions of the Fifth Amendment prohibiting anyone being compelled

to be a witness in a criminal proceeding against himself. The court said in part, at 29 L. ed. at page 752:

“In this very case, the ground of forfeiture as declared in the twelfth section of the Act of 1874, on which the information is based, consists of certain acts of fraud committed against the public revenue in relation to imported merchandise, which are made criminal by the statute; and it is declared that the offender shall be fined not exceeding \$5,000, nor less than \$50, or be imprisoned not exceeding two years, or both; and in addition to such fine such merchandise shall be forfeited. These are the penalties affixed to the criminal acts; the forfeiture sought by this suit being one of them. If an indictment had been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment and to file a civil information against the claimants (that is, civil in form) can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, *or as an alternative, a confession of guilt. This cannot be.*”

Is Congress not attempting to do the identical thing in the case at bar as in *Boyd v. United States*? In the Act, passed on in that case, it said to the defendant in a proceeding instituted under the Act: “You produce your books and invoices and papers or you will be adjudged guilty of defrauding the government of duties, and the property upon which duties are alleged not to have been paid will be forfeited”. In the Act of February

9th, 1909, it says to one in the possession of smoking opium, "You take the stand and explain your possession of this opium to the jury's satisfaction—establish that it was not imported or was imported before April 1st, 1909, or that you had no knowledge that it was imported after that date—or you will be adjudged guilty of having concealed smoking opium knowing that it was imported after April 1st, 1909".

There is no material difference between the two Acts in this respect. In both Congress is attempting to prescribe by statute a rule of evidence that would operate disadvantageously to one who refused to be a witness against himself. And this was decided by *Boyd v. United States* to be in violation of the guaranty of the Fifth Amendment that no one should be compelled to be a witness against himself in a criminal case. As was said by Judge Hammond of the United States Circuit Court in discussing *Boyd v. United States*, in *United States v. Bell*, 81 Fed. 830, at page 836:

"In *Boyd v. U. S.*, 116 U. S. 616, 6 Sup. Ct. 524, it was distinctly held that it is sufficient compulsion to bring a case within the prohibition of the fifth amendment to the constitution of the United States that a rule of evidence prescribed by statute would operate disadvantageously to him in the event the citizen refused to obey an unlawful order to produce evidence against himself, it being held that it is equivalent to the compulsory production of papers to make the non-production of them a confession of the allegations which it is pretended they will prove; and in the concurring opinion Mr. Justice Miller says:

‘Though the penalty for the witness’ failure to appear in court with the criminating papers is not fine and imprisonment, it is one which may be more severe, namely, to have charges against him of a criminal nature taken for confessed, and made the foundation of a judgment of the court. That this is within the protection which the constitution intended against compelling a person to be a witness against himself is, I think, quite clear.’

And he placed the decision in that case upon the ground that it was a violation of the fifth amendment to the constitution of the United States, that no person shall be compelled in any criminal case to be a witness against himself, and that it was not a case of the unlawful seizure and search of private papers, in violation of the fourth amendment. The chief justice agreed in this view, while the other members of the court thought it was a violation of both these amendments. Whatever may be thought of this difference of opinion, the case establishes beyond doubt that the compulsion prohibited by the fifth amendment is not alone physical or mental duress, such as comes from unlawful commands and authoritative orders by those engaged in extorting testimony, *but comprehends also that lesser degree of compulsion which subjects the citizen to some important disadvantage by the use of means to procure the evidence which it is desired should be extracted from him.*”

Similar decisions have been reached by the courts of New York in passing upon a similar statute. In *Peek v. Cargill*, 167 N. Y. 391; 60 N. E. 775; 53 L. R. A. 888, the State Commissioner of Excise instituted a statutory proceeding against the defend-

ant to revoke a liquor tax certificate issued to the defendant. The statute authorizing the proceeding (Laws of New York, 1896, Chapter 112) further provided that after service of a petition to revoke a liquor tax certificate and an order to show cause, the judge may revoke the certificate unless the holder files a verified answer raising an issue as to some material point in the petition. The New York Court of Appeals held that the liquor tax certificate was property and not a mere license and that as the proceeding was for the forfeiture of property it was criminal in nature and that the constitutional prohibition against compelling one to be a witness against himself in a criminal proceeding applied. The court then held that the statutory provision above described violated this constitutional prohibition, saying in part, at 60 N. E., at pages 776-777:

“It is plain that what the statute practically provides for is that in such cases the accused shall be presumed to be guilty unless he denies his guilt under oath. If he omits to deny the statements of the petition on oath, the facts charged are to be taken as confessed, and a forfeiture follows. If the party against whom the proceeding is instituted is really guilty of the offense charged, he is thus compelled to confess his guilt, either by his oath or by silence, and then the forfeiture of his property rights follows. He has no other alternative, unless he is tempted to tamper with his conscience and deny the truth on oath. It is not competent for the legislature to place a citizen in such a disadvantageous position in order to protect his liberty or his property. In any proceed-

ing by the state to deprive him of the one or the other, the facts which in law justify it must be alleged and established. The legislature has no power to enact that they may be inferred or presumed from the silence of the party accused, or from his failure to answer under oath. This is especially true when the acts charged are not only the basis of a penalty or a forfeiture, but constitute a crime. It is the constitutional right of the party charged with the commission of acts which, if true, constitute a crime or create a penalty or impose a forfeiture, to answer without verification. No law can be valid which directly or indirectly compels a party to accuse or incriminate himself, or to testify by affidavit or otherwise with respect to his guilt or innocence. In every case when he elects to remain silent with respect to any charge involving unlawful acts which are criminal or subject him to a penalty or forfeiture, that is a constitutional privilege which the legislature may not invade. The courts have insisted upon giving to the constitutional provision a construction broad and liberal enough to permit a citizen to remain entirely silent with respect to the truth or falsity of any criminal charge against him, if he so elects, and his right to refuse to verify a pleading is as clearly within the privilege as his right to refuse to testify. The constitutional immunity from every species of incrimination may be as effectually violated by a law which compels a person to plead or deny upon oath any charge involving a criminal offense, without regard to the form of the investigation, as by a law compelling him to testify as a witness. The privilege of silence secured by the constitution applies to the one case as well as the other. (Citing authorities.) The principles decided in these cases establish the proposition that it was

not within the power of the legislature to dispense with the necessary allegations and proof of the facts constituting the offense by enacting virtually that no proof need be given by the state unless the party charged with the violation of the law denies the charges under oath. *The statute virtually authorizes a presumption of guilt from an omission of the accused to testify, and therefore it is a law adjudging guilt without evidence, and reverses the presumption of innocence. An enactment of this character violates fundamental principles binding alike upon the legislature and the courts."*

A similar decision was made and the above quoted paragraph was quoted with approval by the Supreme Court of New York in *Matter of Cullinan*, 82 N. Y. App. Div. 445; 81 N. Y. S. 567; and again in *Matter of Cullinan*, 40 Misc. Rep. 423; 82 N. Y. S. 337, the New York Supreme Court approved of *Peck v. Cargill*.

What distinction can be made between the New York Statute and the Act of February 9th, 1909? The New York Statute said to the holder of the liquor tax certificate sought to be revoked, "You file a verified denial of the allegations of the State Excise Commissioner's petition or your property will be taken from you". The Act of February 9th, 1909, says to one in possession of smoking opium, "You explain your possession to the satisfaction of the jury—prove that this opium was not imported or was imported before April 9th, 1909, or that you didn't know that it was imported after that date—or you will go to jail". Both enactments, as stated by the New York Court in *Peck v.*

Cargill, "virtually authorize a presumption of guilt from an omission of the accused to testify, and therefore laws adjudging guilt without evidence, and reverse the presumption of innocence". And it is submitted, as further stated by the New York court in that case, "Enactments of this character violate fundamental principles binding alike upon the legislatures and the courts".

IV. CONCLUSION.

It will undoubtedly be urged by the government, as stated by the trial judge in his instructions to the jury assigned herein as error, that the provisions of the Act of February 9th, 1909, making the possession of smoking opium presumptive of the accused being guilty of having concealed smoking opium, "are made a part of the law because of the difficulty of proving guilty knowledge" (Tr. page 90). This argument has been relied on in similar cases, but always repudiated. As said in *People v. Reardon*, 124 N. Y. App. Div. 818; 109 N. Y. S. 504, at 507 (affirmed in 197 N. Y. 236; 90 N. E. 829; 134 A. S. R. 871; 27 L. R. A. (N. S.), 141):

"It is undoubtedly true that without the right of search it will be difficult to discover and punish violations of the act taxing stock sales; but that consideration will not serve to uphold an act plainly violative of the Constitution and of the right of individual liberty and immunity which constitutes the very cornerstone of our political structure."

So in the case at bar, while it may be difficult for the government to discover and punish violations of the opium statute without the use of these presumptions, that difficulty cannot be made a justification for subverting the Constitutional right of an accused to be presumed innocent until proved guilty beyond a reasonable doubt guaranteed by the due process clause—or for overthrowing the constitutional privilege of an accused not to be compelled to be a witness against himself. The question is not whether it will be difficult for the government to convict without the aid of these presumptions. The question is Do these presumptions violate the constitutional rights of the accused? And in considering this question the attitude of the court should be that indicated by the United States Supreme Court in *Boyd v. United States* (*supra*):

“It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon. Their motto should be ‘*obsta principiis*’. We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a just presentation, from noticing objections which become developed by time and the practical application of the objectionable law.”

Dated, San Francisco,
February 26, 1917.

Respectfully submitted,

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No. 2864

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NG CHOY FONG,

Plaintiff in Error,

VS.

THE UNITED STATES OF
AMERICA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

Upon Error from the Southern Division of the United States
District Court for the Northern District of California,
First Division

JOHN W. PRESTON,
United States Attorney,

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Filed this.....day of March, 1917.

FRANK D. MONCKTON, Clerk,

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No. 2864.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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vs.

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BRIEF FOR DEFENDANT IN ERROR.

INTRODUCTION.

The plaintiff in error was convicted of a violation of the Act of February 9, 1909, as amended January 17, 1914, for having on the 12th day of August, 1915, at San Francisco, California, concealed and facilitated the transportation and concealment of 660 five-tael cans of opium prepared for smoking purposes, which she then and there well knew had been imported into the United States contrary to law.

At the trial of the case before the District Court the jury was instructed, among other things, as follows:

“The act under which this prosecution is had is as follows: ‘That after the first day of April,

nineteen hundred and nine, it shall be unlawful to import into the United States opium in any form or any preparation or derivative thereof: Provided, That opium and preparations and derivatives thereof, other than smoking opium or opium prepared for smoking, may be imported for medicinal purposes only, under regulations which the Secretary of the Treasurer is hereby authorized to prescribe, and when so imported shall be subject to the duties which are now or may hereafter be imposed by law.'

'Sec. 2. That if any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any opium or any preparation or derivative thereof contrary to law, or (and this is the portion with which we are here concerned) shall receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such opium or preparation or derivative thereof after importation, knowing the same to have been imported contrary to law, such opium or preparation or derivative thereof shall be forfeited and shall be destroyed, and the offender shall be punished,—as provided. Whenever, on trial for a violation of this section, the defendant is shown to have, or to have had, possession of such opium or preparation or derivative thereof such possession shall be deemed sufficient evidence to authorize conviction unless the defendant shall explain the possession to the satisfaction of the jury.'

'Sec. 3. That on and after July first, nineteen hundred and thirteen, all smoking opium or opium prepared for smoking found within the

United States shall be presumed to have been imported after the first day of April, nineteen hundred and nine, and the burden of proof shall be on the claimant or the accused to rebut such presumption.'

These provisions are made a part of the law because of the difficulty of proving guilty knowledge, and render it necessary only that the Government prove that the defendants had after July 1st, 1913, smoking opium in their possession, when the presumption at once arises that it had been imported after April 1st, 1909,—and such possession imputed to the defendants a guilty knowledge sufficient to warrant a conviction, unless the defendants shall explain such possession to your satisfaction. If therefore you are satisfied from the evidence beyond a reasonable doubt that defendants did have possession of this opium, and that it was smoking opium, then such possession would be sufficient to warrant a conviction, unless the defendants have explained such possession to your satisfaction.' "

Plaintiff in error assigns as error that part of the instruction, being sections 2 and 3 of the Act of February 9, 1909, as amended January 17, 1914, and that part of the instruction above quoted which immediately follows section 3 of the Act and is based on sections 2 and 3 of the Act. In other words, the plaintiff in error contends that sections 2 and 3 of the Act are unconstitutional and void as being violative of the fifth amendment to the Constitution of the United States in that they deprive the person accused of the due process of law guaranteed by the Constitution,

by depriving her of the presumption of innocence guaranteed by the Constitution of the United States and forcing her to become a witness in the case, whether she wishes to or not.

ARGUMENT.

Sections 2 and 3 of the Act of February 9, 1909, as amended, do not violate any of the guarantees contained in the fifth amendment to the Constitution of the United States.

The first section of the opium act absolutely forbids the importation of smoking opium into the United States after the first day of April, 1909. Sections 2 and 3 of the act were passed for the purpose of effectively enforcing the first section. The power to pass such laws as are necessary for the enforcement of other laws has long been recognized and was affirmed by the Supreme Court of the United States in the case of *Brolan, et al, vs. United States*, 236 U. S. 216, 59 Law Ed. 544, in which case the Supreme Court had under consideration section 2 of the act in question here.

The provisions of section 2 with regard to possession are identical with those of section 3082 R. S. That section has been enforced and its constitutionality has been assumed by the courts for over fifty years. If Congress could lawfully place such restriction on merely smuggled goods, it can equally legislate with regard to absolute contraband.

Section 3 of the act establishes a legal presumption that opium found in the United States after July 1, 1913, was imported after April 1, 1909. In fact, it goes little further than the actual presumption on that matter in view of the fact that the importation of opium had by that time been absolutely prohibited for a period of four years and three months. It is a matter of common knowledge that opium is not produced in the United States. The raw product comes almost exclusively from China (See Cong. Rec. Vol. 43, p. 1681 Et seq.; Message of President Taft upon the opium problem, 61st Cong., 2nd Sess. Senate Doc. 377.)

Similar legislation has been upheld by the courts. In *State vs. Patrick Higgins*, 13 Rhode Is. Rep. 330, the constitutionality of a statute was approved which provided that

“Evidence of the sale or keeping of intoxicating liquors for sale in any building, place, or tenement, shall be prima facie evidence that the sale or keeping is illegal.”

The Supreme Court of Rhode Island upheld the same provision of the statute against attacks charging unconstitutionality in the case of *State vs. Beswick*, 13 Rhode Is. Rep. p. 211, and *State vs. Mellor*, 13 Rhode Is. Rep., p. 666.

The Court of Appeals of New York in the case of *Board of Commissioners of Excise of the City of Auburn vs. Merchant*, 8 N. E. 484, upheld the constitutionality of a law which provides that

“Whenever any person is seen to drink in such shop, or house, out house, yard, or garden belonging thereto, any spirituous liquors or wines forbidden to be drank therein, it shall be prima facie evidence that such spirituous liquors or wines were sold by the occupant of such premises, or his agent, with the intent that the same should be drank therein.”

In *Howard vs. Moot*, 64 N. Y. 261, quoted in the Merchant case, the court said:

“The rules of evidence are not an exception to the doctrine that all rules and regulations affecting remedies are at all times subject to modification and control by the legislature. x x x It may be conceded for all the purposes of this appeal, that a law that should make evidence conclusive, which was not so necessarily in and of itself, and thus precluded the adverse party from showing the truth, would be void, as indirectly working a confiscation of property, or a destruction of vested rights. But such is not the effect of declaring any circumstance, or any evidence, however, slight, prima facie proof of a fact to be established, leaving the adverse party at liberty to rebut and overcome it by contradictory and better evidence.”

139 NY 32; 34 NE 759

The case of *People vs. Cannon*,[^] decided by the Court of Appeals of New York, on October 3, 1893, upheld the constitutionality of the provision of a statute which provided that possession by a dealer in second-hand articles of any registered stamped bottles, without the written consent of the owner of the stamp, shall be presumptive evidence of unlawful

use, purchase, and traffic therein, there being such connection between the possession and an unlawful traffic therein as to make it proper presumptive evidence of guilt.

A good discussion of the constitutionality of such enactments appears in the opinion of the court.

On this same point see also Wigmore on Evidence, Vol. 2, p. 1671 and notes, being a part of section 3 of paragraph 1354.

While the presumption of innocence accompanies the accused until the verdict and does not cease when the case is submitted to the jury, yet it has been held that in a prosecution for murder, the possession of articles apparently taken from the deceased raises a *prima facie* presumption of guilt to be rebutted or explained away by the accused.

Wilson vs. U. S. 162 U. S. 613, 40 Law Ed. 1090.

Furthermore, it has been repeatedly held that recent possession of stolen goods may raise a presumption of guilt in prosecutions for burglary, larceny and robbery.

12 *Cyc.* p. 385.

An examination of the cases cited by counsel for the plaintiff in error shows that for most part they are clearly distinguishable from the case here.

In *State vs. Beswick*, 13 Rhode Is. 211, the Court held to be unconstitutional that part of a statute which provided that the notorious character of prem-

ises, or of the persons frequenting the same, or the keeping of implements usually appertaining to places where liquors are sold shall be prima facie evidence that prohibited liquors are kept on such premises for the purpose of sale was unconstitutional.

But the same case, as I have hereinabove pointed out, supports the contention of the Government here with regard to another section of the same statute. The distinction between the two sections considered in that case, one of which was held to be unconstitutional and the other to be constitutional, is clear, as will appear on reading the entire decision.

People vs. Lyon, 34 N. Y. Sup. Ct. R. 180 (27 Hun.) is a decision of the Supreme Court rendered in 1882 and in my opinion is superseded by the case of *Commissioners etc. of Auburn vs. Merchant*, 8 N. E. 484, decided by the Court of Appeals in New York in 1886. This latter case upholds the constitutionality of the same provision which was declared to be unconstitutional in the Lyon case.

The case of *State vs. Divine*, 4 S. E. 477, cited by counsel for plaintiff in error, is distinguished from the case at bar on account of the fact that in the that case the statute provided that whenever any livestock shall be killed by the engine or cars on any railroad, and such killing is proved, it shall be prima facie evidence of negligence in any indictment therefor against the conductor or engineer of the train and certain named officers of the road, and further provided that such killing was a misdemeanor.

Divine was an officer of the railroad who was not present at the time of the killing at all and the Court held, and properly so, that the act was unconstitutional because it undertakes to declare a person guilty of an act without showing that he was connected with it in any way, upon mere proof that he is an officer of the road and that certain animals were killed by a train operated by that road.

The case of *Cummings vs. Missouri*, 71 U. S. 277, cited by counsel for plaintiff in error, involves a number of unreasonable restrictions placed upon certain classes of people and cannot be held as authority for the proposition contended for by plaintiff in error here.

Peck vs. Cargill, 167 N. Y. 391, 60 N. E. 775, cited by counsel for plaintiff in error at page 37 of his brief, is distinguished from the case at bar on account of the fact that the statute permitted any citizen to file a petition for the forfeiture of a liquor license and provided that the license should be revoked without any evidence whatever unless the holder of the license filed a verified answer, putting in issue a material fact relative to the charges made. In other words, the statute provided for the confiscation of property without evidence, unless the owner went on record with a verified denial.

The cases of *Boyd vs. United States*, 116 U. S. 616, 29 Law Ed. 746, and *United States vs. Bell*, 81 Fed. 830, cited by counsel, have regard to compulsory production of a man's private papers and the compelling

of him to testify in a case where he might incriminate himself, and the language of the Court in those cases cannot be said to apply to legal presumptions created by statutes which do not in themselves compel the attendance of a defendant as a witness or bring in his private papers.

Ex parte Wong Hane, 108 Cal. 680, 41 Pac. 693 and *ex parte Kameta*, 36 Oreg. 251, 60 Pac. 394 declare unconstitutional certain ordinances which provide that

“It shall be unlawful for any person to have in his possession, unless it be shown that such possession is innocent or for a lawful purpose, any lottery ticket, etc.”

It seems, however, that such a statute with regard to lottery tickets and the other articles mentioned in the statute places a greater burden on the defendant than is placed by sections 2 and 3 of the act in question here.

Section 3 provides in effect that after a period of four years and three months have elapsed from the date when smoking opium became absolute contraband with regard to importation into the United States, all opium found should be considered as contraband in the United States. It thereby makes opium a dangerous thing to handle and it is not inconsistent with the rights of one who desires to handle it thereafter to require by section 2 of the act that he show his right by explaining his possession after possession shall have been proved.

Furthermore, neither the California nor the Oregon Court refers to or reviews any authority whatever on the constitutionality of such legislation, but apparently the California decision comes out of a clear sky and is followed by Oregon.

In *Henderson Bridge Company vs. Henderson City*, (1899) 173 U. S. 592, 615, the Court said:

“x x x An Act of Congress should not be declared unconstitutional unless its repugnancy to the supreme law of the land is too clear to admit of dispute. x x x.”

CONCLUSION.

The Counsel for defendant in error submits that section 2 of the opium act is constitutional and is justified by section 3082 of the Revised Statutes which has stood on the books unchallenged for fifty years.

Section 3 of the act does little more than place on the statute books the natural presumption which arises with regard to an article which for over four years has been declared contraband and which common experience has proven can easily be smuggled into the country. Neither sections require a defendant to take the stand in the strict sense of that word any more than does the legal presumption of long standing that recent possession of stolen goods raises a presumption of guilt, or that possession of articles belonging to a man who has been murdered found in the possession of the defendant raises a presumption of guilt with regard to him.

We respectfully submit that the instructions of the trial court were proper and that the statute in question is constitutional.

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No. 2864

IN THE
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REPLY BRIEF FOR PLAINTIFF IN ERROR.

GEORGE J. HATFIELD,

Attorney for Plaintiff in Error.

Filed this.....day of March, 1917.

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By.....Deputy Clerk.

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REPLY BRIEF FOR PLAINTIFF IN ERROR.

Upon the oral argument some questions of the members of the Honorable Court and some arguments of the Assistant District Attorney, indicated that the position of plaintiff in error had not been made clear in her brief heretofore served and filed.

Plaintiff in error does not contend that the requirement that no person shall be deprived of liberty without due process of law prevents Congress absolutely from requiring in criminal cases presumptions to be raised on the establishment of certain facts. We admit that Congress may provide, even in criminal cases, that when certain facts have been proved they shall be *prima facie* evidence of other facts, when the former facts have some fair relation to and natural connection

with the fact presumed. But we emphatically deny that Congress has any power whatsoever to require, from facts which are consistent with the innocence of the accused and not any necessary constituent of the crime charged, the presumption that an accused is guilty unless he satisfies the jury to the contrary. And it is submitted that this view of the law is borne out, not only by the authorities cited by plaintiff in error, but also by the very authorities cited by the government itself. In *People v. Cannon*, 139 N. Y. 32, 34 N. E. 759 (cited and relied on by the government on page 6 of its brief), the view of plaintiff in error is indicated on page 762 of the *Northeastern Report* as follows:

“It cannot be disputed that the courts of this and other states are committed to the general principle that, even in criminal prosecutions, the legislature may, *with some limitations*, enact that when certain facts have been proved they shall be *prima facie* evidence of the existence of the main fact in question. The limitations are that the fact upon which the presumption is to rest must have some fair relation to, or natural connection with, the main fact. The inference of the existence of the main fact, because of the existence of the fact actually proved, must not be merely and purely arbitrary, or wholly unreasonable, unnatural, or extraordinary; and the accused must have, in each case, a fair opportunity to make his defense, and to submit the whole case to the jury, to be decided by it after it has weighed all the evidence, and given such weight to the presumption as to it shall seem proper.”

Even this authority, upon which the government so strongly relies, clearly indicates that there are

limitations upon the power of Congress in its control over the rules of evidence and procedure. Congress cannot arbitrarily require presumptions of guilt to be raised from facts which are consistent with the innocence of accused, and which are not a necessary constituent of the crime charged. The presumptions which Congress can require are those which have some fair relation to or necessary connection with the crime charged.

The government has suggested two presumptions of the kind within the power of Congress to enact. These presumptions were recognized by the rules of common law governing criminal procedure at the time the Constitution and the first ten amendments thereto were adopted. The facts from which the presumption in each case is made have a fair relation to the fact presumed and have a necessary connection with the crime charged.

In the one case it was presumed from the possession of stolen goods that the possessor knew that the goods were stolen. In the other case it was presumed from the possession of the effects of a murdered person that the person committed the murder. *But it must be noted that the prosecution has to prove that the goods found in the possession of the accused were actually stolen goods or had actually belonged to the murdered person before the presumption is raised.*

These cases it is submitted, are not analogous to the case at bar and cannot support the presumption sought to be made by the act of February

9th, 1909. If that act required the prosecution to establish the fact that the smoking opium found in the possession of the accused was actually imported after April 1st, 1909, then it would have to be admitted that the analogy of the common laws presumptions, raised from the possession of stolen goods or effects of a murdered person, would justify Congress in requiring a presumption that the possessor knew the opium was imported after April 1st, 1909. But the act doesn't require the prosecution to establish any such thing. It attempts to make the possession of any smoking opium, whenever imported, *prima facie* evidence of guilt. It goes far beyond the common law presumptions referred to and attempts to make possession of opium presumptive that the opium was imported after April 1st, 1909, and that the possessor knew that fact. Possession of smoking opium is perfectly consistent with the fact that the opium was imported before April 1st, 1909, or with the fact that it was produced here. Nor is a necessary constituent of the crime charged. If the opium was imported before April 1st, 1909, or if it was produced here, then the possession of it is not a crime. The crux of the very matter is whether or not the opium was imported after April 1st, 1909. Whether or not a crime was committed depends on that fact, and it is beyond the power of Congress to predetermine that fact and take from the accused the right to have that fact determined by a court and jury after a trial conducted according to the

fundamental methods existing at common law at the adoption of our Constitution.

Consider the common law presumptions referred to in a form analogous to that attempted to be required by the act of February 9th, 1909. Instead of raising the presumption that the possessor of goods actually proved to have been stolen, knew the goods to have been stolen, suppose Congress attempted to require that goods of a similar character to those stolen would be presumed to have been stolen and that the possessor was guilty unless he proved the contrary to the satisfaction of the jury. In other words, if a fifty dollar bill or a sack of wheat were stolen it would be presumed that any fifty dollar bill or sack of wheat was the stolen bill or sack, as the case might be, and the possessor was guilty. It would be absurd to contend that Congress has any such power. The courts would immediately brand such an act unconstitutional as depriving an accused of liberty without due process of law.

Yet in the case at bar Congress is attempting to raise a presumption exactly analogous to the one suggested. In the one case it attempts to presume that any fifty dollar bill or any sack of wheat was the one stolen. In the other case it attempts to presume that any smoking opium was imported after April 1st. And in both cases, that the possessor of such bill or sack or opium was guilty. Clearly possession of a fifty dollar bill or a sack of wheat or a can of smoking opium is

perfectly consistent with the fact that the bill or the sack was not stolen or that the can of opium was not imported after April 1st, 1909.

So too the possession of a fifty dollar bill or of a sack of wheat is not a necessary constituent of the crime of having possession of a stolen bill or sack. It is not a constituent of the crime unless that particular bill or that particular sack possessed by the accused is the bill or sack stolen. Likewise the possession of a can of opium is not a constituent part of the crime of having knowingly concealed a can of smoking opium imported after April 1st, 1909, unless that particular can was imported after that date.

In both cases the fact sought to be presumed—that is the guilt of the accused—has no fair relation or necessary connection with the facts from which the presumption is sought to be made. Such a presumption is arbitrary and unreasonable. The possession of a fifty dollar bill or a sack of wheat cannot reasonably be said to have any fair relation to or necessary connection with the crime of knowingly possessing or concealing a stolen fifty dollar bill or sack of wheat. The whole thing depends on whether the particular bill or sack was the one stolen. So too the possession of a can of smoking opium has no fair relation or necessary connection with the crime of having knowingly concealed a can of smoking opium imported after April 1st, 1909. The whole thing depends on whether it was or was not so imported. And in neither case

can Congress authorize, from the possession of the bill or sack or can, the presumption of guilt.

It is submitted that an examination of the cases cited by the government will not develop anything contrary to that herein expressed.

In *State v. Beswick*, 13 Rhode Island 211, cited and discussed by plaintiff in error on pages 21 to 22 of her brief, the court held unconstitutional a provision of a law prohibiting the sale of liquor, to the effect that it was not necessary to prove an actual sale of liquor in any particular premises in order to establish that liquors were kept there for sale, but that the notorious character of any such premises or the notoriously bad or intemperate character of persons frequenting the same or the keeping of implements or appurtenances usually appertaining to grog-shops or places where liquors are sold, shall be *prima facie* evidence that liquors are kept on such premises for the purpose of sale within the State.

The government, on page 21 of its brief, cites the case as supporting a provision of the law providing for a presumption similar to the one in the Act of February 9th, 1909. An examination of the cases discloses no such provision.

It appears that the act in question prohibited the sale or keeping for sale of intoxicating liquors, except for medicinal and sacramental purposes. And the sale for these purposes was licensed as in the act provided. The act also provided that

“no negative allegations of any kind need be averred or proved” in any criminal proceedings for the enforcement of the act. The defendant contended this provision unconstitutional as a deprivation of liberty without due process of law. The court rejected the contention and held the provision valid. It pointed out the familiar principle of criminal pleading that if the prohibitory clause of the statute, prohibiting the sale or keeping for sale of liquors, had not incorporated by reference the exceptions, permitting the sale for medicinal and sacramental purposes when licensed, that no negative averments would be required by the rules of criminal pleading. (See 22 Cyc., 344 seq., especially notes 46 and 47, on page 346.) It then concluded that, since the reference could be stricken out by amendment and the burden of affirmatively proving the license and exception would be placed on the defendant, the legislature could accomplish the same result by direct enactment. The court said in part at page 215:

“No negative averments would be required by the rules of criminal pleading if the exceptions to the prohibition were not incorporated by reference in the prohibitory clause. But for the reference the burden would fall on the accused, if he were within an exception, to show it by way of defence. So too the burden would be cast upon him if the reference were stricken out by amendment, and certainly if the legislature can throw this burden on the accused by such an amendment, it cannot be unconstitutional for it to accomplish the same result by direct and original enactment. The

only effect of the enactment is to require that if any of the few persons who are privileged to sell intoxicating liquors are prosecuted for selling or keeping for sale, they shall show that they are privileged in defence, instead of requiring the prosecution to show in every case that the accused is not privileged. We can but think that the requirement is as constitutional as it is reasonable."

The decision of the Rhode Island court on this point cannot support the contention of the government that the Congress has power to require **any** sort or kind of fact to be presumed upon the establishment of some other fact. It does not at all deal with such a proposition. It deals merely with matters of criminal pleading.

Nor does the case of *State v. Patrick Higgins*, in the same volume (13 Rhode Island, 330), cited by the government on page 5 of its brief, give any greater support to the government. In that case the Rhode Island court, speaking through the same judge who decided the *Beswick* case, was dealing with the same act as construed in the *Beswick* case. The only difference was that in this case it appeared that the legislature had repealed the provision that "no negative allegations of any kind need be averred or proved" and had substituted a provision that "evidence of the sale or keeping of intoxicating liquors for sale shall be *prima facie* evidence that the sale or keeping is illegal". The court held that in effect this provision was the same as that repealed and was, therefore, constitutional, saying in part at page 331:

“The question thus presented is in our opinion essentially the same as one of the questions decided in *State v. Beswick*, ante, p. 211. The court decided in that case that the General Assembly has the constitutional power to relieve the State, by direct enactment, in liquor prosecutions, from the necessity of either alleging or proving that the accused has no license, leaving it for him to show his license, if he has it, by way of defence. The enactment here, though superficially different, is identical in effect with the enactment there sustained. If then the decision there was right, the enactment here ought to be sustained. We see no reason to doubt the correctness of the decision. *It is entirely reasonable, we think, that a person who is prosecuted for an act, which is generally criminal, should, if licensed to commit it, be required to show his license in defence whenever there is evidence to establish his guilt if he has no license.* To require this is not to violate any fundamental rule or principle established by the common law for the protection of the subject or the citizen; but, on the contrary, it is according to the usual course of procedure, and has never been supposed to be inconsistent either with the maxim that every person is to be presumed innocent until he is proved guilty, or with the great provision of *Magna Charta*, that ‘no man shall be deprived of life, liberty, or property unless by the judgment of his peers or the law of the land.’ ”

This decision cannot support the contention of the government that Congress has power to require the guilt of an accused to be presumed from facts which are consistent with the innocence of the accused and which are no necessary constituent of the crime charged. In fact the Rhode Island

court expressly points out that no such a decision is made saying in part at 332:

“The enactment which was condemned in State v. Beswick was something radically different, and something too which, in so extreme a form, was utterly without precedent. It was an enactment which related, not to the proof or the disproof of any special privilege or exemption, but to the proof of the offence itself, and obliged the jury to presume its commission from circumstances which were not only consistent with the innocence of the accused, but would not be any necessary constituent of the offence if committed.”

In *State v. Mellor*, in the volume (13 Rhode Island, 666), cited by the government on page 5 of its brief, it appeared that the legislature had amended the provision construed in the Higgins case by striking out the words “*prima facie*” so that the provision was that “evidence of the sale or keeping of intoxicating liquors for sale shall be evidence that the sale is illegal”. On the basis of the Higgins case the court held the provision constitutional, saying in part at page 669:

“The striking out of the words prima facie has no other effect than to leave the jury free to decide for or against the State, according as they consider the evidence convincing or not.”

All these cases stand for is that the legislative body may validly require one, who is licensed to do that which but for the license would be criminal, to affirmatively plead and prove the license. But this is not the proposition presented by the Act

of February 9th, 1909. The possession of smoking opium is not criminal unless it was imported after April 1st, 1909. Congress does not purport to forbid the possession of all opium except when licensed. In fact Congress has no power to make any such law. Its power to penalize the possession of smoking opium imported after April 1st, 1909, is derived from its power to regulate commerce.

Brolan v. United States, 236 U. S. 216;
35 Sup. Ct. Rep. 285.

And that power does not extend to enable Congress to penalize the possession of opium imported prior to the time Congress prohibited the importation of opium.

People v. Cannon, 139 N. Y. 32; 34 N. E. 759, cited by the government on page 6 of its brief, is analogous to the Rhode Island cases. The law in question, prohibited junk dealers and dealers in second-hand goods to sell, buy, give, take or dispose of, or traffic in, stamped bottles, without the written consent of the person whose stamp was on the bottle. The law provided further that possession of such bottles by a junk man or second-hand dealer should be presumptive of guilt. In other words, the law required one who committed the act prohibited by the law, unless licensed, to prove the license or written consent. The court held the provisions constitutional. There is nothing different in this case from the Rhode Island case, and, indeed, the court recognizes limitations on the power of legislative bodies to require presumptions

of guilt on the establishment of certain facts. This is shown by the quotation from the opinion given on page 2 of this brief.

Neither the case of *Howard v. Moot*, 64 N. Y. 261, cited by the government on page 6 of its brief, nor the quotation from the case given on that page, deal with the question at bar. That case was a civil case and not a criminal one. No question of the power of a legislative body to subvert the presumption of innocence was presented. The case merely dealt with the existence of the power of a legislative body to modify and control rules of evidence and procedure. In the matter at bar, we are not concerned with the existence of the power, but with the limitations upon it in criminal cases.

Dated, San Francisco,

March 21, 1917.

Respectfully submitted,

GEORGE J. HATFIELD,

Attorney for Plaintiff in Error.

United States
Circuit Court of Appeals

For the Ninth Circuit.

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Appellant,

vs.

J. C. RUDBACH,

Appellee.

Apostles on Appeal.

Upon Appeal from the United States District Court for
the Northern District of California,
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Names and Addresses of Attorneys.

IRA S. LILLICK, Esquire, Proctor for Libelant.

MARCEL E. CERF, Esquire, H. W. GLENSOR,
Esquire, and CHAS. H. SOOY, Esquire, Pro-
ctors for Respondent and Claimant.

UNITED STATES OF AMERICA.

*District Court of the United States, Northern Dis-
trict of California.*

No. 15,939.

J. C. RUDBACH,

Libelant and Appellee,

vs.

The Steamer "SOUTH COAST," etc.,

Respondent.

SOUTH COAST STEAMSHIP COMPANY (a Cor-
poration),

Claimant and Appellant.

Praeipce (and Stipulation and Order Re Exhibits).

To the Clerk of Said Court:

Sir: Please issue and forward to the clerk of the
United States Circuit Court of Appeals for the Ninth
Circuit, apostles in the above-entitled libel and in-
clude therein the following:

Libel;

Answer to libel and exhibit thereto attached;

Reporter's transcript;

Opinion and order to enter a decree in favor of the
libelant for the amount prayed for;

Final decree;

Notice of appeal;

Assignment of errors;

Claimant's Exhibit "B";

This praecipe and stipulation;

Stipulation dated December 23, 1915.

And please forward to the clerk of the United States Circuit Court for the Ninth Circuit the following exhibits, to wit: [1*].

Libelant's Exhibits Nos. 1, 2, 3, 4, 5, and 6; Claimant's Exhibit "A."

Dated September 28, 1916.

MARCEL E. CERF,
C. H. SOOY,

Proctors for Claimant and Appellant.

It is hereby stipulated and agreed that the apostles in the above-entitled libel need include nothing except that which is enumerated in the foregoing Praecipe, and that the exhibits enumerated above may be delivered to the clerk of the United States Circuit Court for the Ninth Circuit, as above requested.

Dated September 28, 1916.

IRA S. LILLICK,
Proctor for Libelant and Appellee.
MARCEL E. CERF,
C. H. SOOY,

Proctors for Libelant and Appellee.

By the Court: It is so ordered.

Dated September 28, 1916.

M. T. DOOLING,
Judge.

*Page-number appearing at foot of page of original certified Apostles on Appeal.

[Endorsed]: Filed Sep. 28, 1916, W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [2]

*In the District Court of the United States, for the
Northern District of California.*

IN ADMIRALTY—No. 15,939.

J. C. RUDBACH,

Libelant,

vs.

The Steamer "SOUTH COAST," Her Boilers, Engines, Machinery, Tackle, Apparel and Furniture,

Respondent.

Libel for Supplies, etc.

To the Honorable M. T. DOOLING, Judge of the District Court of the United States for the Northern District of California:

The libel of J. C. Rudbach, by occupation a merchant and ship chandler, against the steamer "South Coast," her boilers, engines, machinery, tackle, apparel and furniture, and against all persons lawfully intervening for their interest therein, in a cause of contract civil and maritime, alleges:

I.

That heretofore, to wit, between the 11th day of August, 1915, and the 1st day of November, 1915, the steamer "South Coast," then and there lying at the port of San Pedro, stood in need of certain supplies, provisions and other necessities to enable her to perform her voyages upon the Pacific Ocean and else-

where, and the said J. C. Rudbach then and there, upon the orders of the owners of said vessel, and the agent of said owners, furnished certain supplies, provisions and other necessities in this [3] State for the furnishing of said vessel, and upon the credit of said vessel, to wit, certain goods, wares and merchandise for the supplying and provisioning of said vessel at agreed prices and of the reasonable value of Twelve Hundred Fifty-three and 73/100 Dollars (\$1253.73), which said amount the owners of said vessel, and the agent of said owners then and there agreed to pay.

II.

That no part of said sum of Twelve Hundred Fifty-three and 73/100 Dollars (\$1253.73) has been paid, and that the whole thereof remains unpaid, and notwithstanding the same is due, the said owners of said vessel have neglected, and still neglect, to pay the same, or any part thereof, after demand therefor has been made.

III.

That said amount so due is a lien upon said vessel under and by virtue of the provisions of section 813 of the Code of Civil Procedure of the State of California, and of that certain provision of the Revised Statutes of the United States entitled "An Act Relating to Liens on Vessels for Repairs, Supplies or other Necessaries." (36 Stat. 604.)

AND FOR A FURTHER AND SECOND CAUSE OF ACTION LIBELANT ALLEGES:

I.

That at all of the times hereinafter mentioned

Marine Hardware Co. was, and still is, a corporation duly formed, organized and existing under and by virtue of the laws of the State of California, with its principal place of business in the City of San Pedro, said State.

II.

That heretofore, to wit, between the 11th day of May, [4] 1915, and the 31st day of August, 1915, the steamer "South Coast," then and there lying at the port of San Pedro, stood in need of certain supplies, provisions and other necessities to enable her to perform her voyages upon the Pacific Ocean and elsewhere, and the said Marine Hardware Co. then and there, upon the orders of the owners of said vessel, and the agent of said owners, furnished certain supplies, provisions and other necessities in this State for the furnishing of said vessel, and upon the credit of said vessel, to wit, certain goods, wares and merchandise for the supplying and provisioning of said vessel at agreed prices and of the reasonable value of Three Hundred Ninety-five and 76/100 Dollars (\$395.76).

III.

That the said owners of said vessel, and said agent of said owners, have paid no part or portion of said sum of Three Hundred Ninety-five and 76/100 Dollars (\$395.76), with the exception of the sum of Two Hundred and Fifty Dollars (\$250.00), and that the balance of said sum, to wit, the sum of One Hundred and Forty-five and 76/100 Dollars (\$145.76), and every part thereof, remains wholly due and unpaid, and notwithstanding that the same is due, the said

owners of said vessel have neglected, and still neglect, to pay the same, or any part thereof, notwithstanding that demand has been made for said payment.

IV.

That said amount so due is a lien upon said vessel under and by virtue of the provisions of section 813 of the Code of Civil Procedure of the State of California, and of that certain provision of the Revised Statutes of the United States [5] entitled "An Act Relating to Liens on Vessels for Repairs, Supplies or other Necessaries." (36 Stat. 604.)

V.

That the said Marine Hardware Co. has duly assigned, transferred, set over and delivered to libellant all of its right, title and interest in and to said claim of One Hundred Forty-five and 76/100 Dollars (\$145.76) against said vessel, and that libellant is now the owner and holder thereof.

VI.

That said vessel is now in the Northern District of California and within the jurisdiction of this Honorable Court.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE the libellant prays that process in due form of law, according to the course of this Honorable Court in causes of admiralty and maritime jurisdiction, may issue against the said steamer "South Coast," her boilers, engines, machinery, tackle, apparel and furniture, and that all persons claiming any right, title or interest therein may be

cited to appear and answer all and singular the matters aforesaid; that this Honorable Court will be pleased to decree the payment of the sum of Twelve Hundred Fifty-three and 73/100 Dollars (\$1253.73) and interest, and One Hundred Forty-five and 76/100 Dollars (\$145.76) and interest, with costs, and that said vessel, her boilers, engines, machinery, tackle, apparel and furniture be condemned and sold to pay the same; and that this libelant have such other and further relief in the premises as in law and justice he may be entitled to receive.

J. C. RUDBACH.

IRA S. LILLICK,

Proctor for Libelant. [6]

State of California,

City and County of San Francisco,—ss.

J. C. Rudbach, being first duly sworn, deposes and says: That he has read the within and foregoing libel; that he knows the contents thereof, and that the same is true of his own knowledge.

J. C. RUDBACH.

Subscribed and sworn to before me this 2d day of December, 1915.

[Seal]

C. W. CALBREATH,

Deputy Clerk U. S. District Court, Northern District of California.

[Endorsed]: Filed Dec. 2, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [7]

*In the District Court of the United States for the
Northern District of California.*

IN ADMIRALTY—No. 15,939.

J. C. RUDBACH,

Libelant,

vs.

The Steamer "SOUTH COAST," Her Boilers, En-
gines, Machinery, Tackle, Apparel and Furni-
ture,

Respondent.

Answer.

The answer of South Coast Steamship Company, a corporation, claimant, to the libel of J. C. Rudbach against the steamer "South Coast," in said alleged cause of contract, civil and maritime, alleges and denies as follows:

I.

Alleges that at all of the times referred to in said libel the said steamer "South Coast" was in the possession of Howard R. Levick, Jr., under a charter thereof in accordance with the terms of a charter-party, copy of which is hereto annexed, marked exhibit "A," and is hereby made a part hereof; and all of the supplies, provisions and other necessities referred to in said libel were ordered by said charterer, and by the terms of said charter-party the said charterer was without authority to bind said steamer therefor; all of which libelant knew, or by the exercise of reasonable diligence could have ascertained,

at the time the supplies, provisions and other necessities were furnished, as alleged in said libel.

II.

Denies that libelant furnished the supplies, provisions and other necessities referred to in Article I, of said libel, or any supplies, provisions or other necessities on the order of the [8] owners of said vessel, and/or the agent of said owners, and/or upon the credit of said vessel.

III.

Denies that the owners of said steamer "South Coast" and/or the agent of said owners agreed to pay libelant the sum of twelve hundred fifty-three and 73/100 (\$1,253.73) dollars, as is alleged in Article II of said libel, or any sum.

IV.

Denies that the amount referred to in Article III of said libel, or any amount, is a lien upon said vessel, as is alleged in said Article III, or at all.

ANSWER TO FURTHER AND SECOND CAUSE OF ACTION ALLEGED IN LIBEL.

The answer of South Coast Steamship Company, a corporation, claimant, to the further and second cause of action set forth in the libel of J. C. Rudbach against the steamer "South Coast," in an alleged cause of contract, civil and maritime, alleges and denies as follows:

I.

Alleges that at all of the times in said libel referred to the said steamer "South Coast" was in the possession of Howard R. Levick, Jr., under a charter

thereof, in accordance with the terms of a charter-party, a copy of which is hereto annexed, marked exhibit "A," and is hereby made a part thereof; and all of the supplies, provisions and other necessities referred to in said second cause of action set forth in said libel, were ordered by said charterer, and by the terms of said charter-party the said charterer was without authority to bind said steamer therefor; all of which Marine Hardware Co., referred to in said libel knew, or by the exercise of reasonable diligence could have ascertained at the [9] time the supplies, provisions and other necessities were furnished, as alleged in said second cause of action.

II.

Denies that said Marine Hardware Co. furnished the supplies, provisions and other necessities referred to in Article II, of said second cause of action, or any supplies, provisions or other necessities on the order of the owners of said vessel, and/or the agent of said owners, and/or upon the credit of said vessel.

III.

Denies that the amount referred to in Article IV of said second cause of action, or any amount, is a lien upon said vessel, as alleged in said Article IV, or at all.

WHEREFORE claimant prays that said libel be dismissed, and for its costs.

SOUTH COAST STEAMSHIP COMPANY,

Claimant,

By C. H. SOOY,

Secretary.

MARCEL E. CERF,

H. W. GLENSOR,

C. H. SOOY,

Proctors for Claimant.

State of California,

City and County of San Francisco,—ss.

C. H. Sooy, being first duly sworn, deposes and says: That he is an officer, to wit, Secretary of the South Coast Steamship Company, a corporation, claimant in the above-entitled proceedings, and that he makes this affidavit and verifies this answer for and on behalf of said corporation; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge.

C. H. SOOY.

Subscribed and sworn to before me this 29th day of December, 1915.

[Seal]

FLORA HALL,

Notary Public in and for the City and County of San Francisco, State of California. [10]

Exhibit "A" to Answer.

COPY.

THIS CHARTER PARTY made and concluded in the City and County of San Francisco, State of California, on this the 19th day of June, 1915, by and

between the South Coast Steamship Company, a corporation organized and existing under and by virtue of the laws of the State of California, and having its principal place of business at San Francisco, in said State, the party of the first part, and Howard R. Levick, Jr., of the same place, party of the second part,

WITNESSETH:

FIRST. That the party of the first part for and in consideration of the covenants and agreements hereinafter mentioned, which are to be performed and kept by the party of the second part, does covenant and agree upon the chartering and letting to hire of the steamship or steam schooner "South Coast" unto the said party of the second part for the period of eighteen months from date hereof.

SECOND. That said vessel shall be employed by said party of the second part during the term of this charter party between ports and places on the Pacific Coast of North America, not north of Seattle, nor in any port or ports, nor place or places, nor provided for in the insurance policies covering the insurance to be placed upon said vessel, as hereinafter provided. The cargoes carried by said vessel are to be laden and/or discharged at any dock or place where the party of the second part or his agents may direct, provided that the steamer can always lie afloat at all stages of the tide.

THIRD. The party of the first part hereby places said vessel at the disposal of said party of the second part at the port of San Francisco on this date, and the party of the second part agrees [11] that he

has thoroughly inspected the said vessel, knows her condition at the present time and that he takes said vessel by virtue of this instrument in her present order and condition, and that no representations or promises of whatsoever kind or nature have been made to said party of the second part in regard thereto, and that neither the said party of the first part nor the said vessel shall be liable for any damages, injury or loss that may occur by reason of any defects in the body, tackle, apparel, machinery or appliances of said vessel, even if the same now exists or existed before the commencement of any voyage under this charter party, or at any time during the term of this charter party.

FOURTH. The said party of the second part agrees to immediately, upon taking possession of said vessel, to tow her to the port of Los Angeles, there to install additional tankage of oil facilities according to the requirements of the United States Government, and to make in a thorough and workmanlike manner all repairs of every kind or nature that may be necessary to put the ship in a thoroughly seaworthy condition, and in accordance with the requirements of the United States Inspectors at said Port and, thereafter, during the life of this agreement to maintain said ship in as good condition, after said repairs and tankage is installed, as she will be upon the commencement of her first voyage, reasonable wear and tear excepted. Said party of the second part further agrees that the expense of installing tankage and making said repairs, and the towage

and maintenance of said ship, as hereinabove provided, shall be at his own cost and expense.

FIFTH. It is understood that this charter is a charter of the bare vessel, and that said party of the second part shall furnish the crew, pay their wages, victual them, furnish all deck and engine room and saloon stores, and supplies of every kind and nature [12] pay for all fuel, fresh water, port charges, wharfages, Customs charges, Customs fines or Government fines, pilotages, overtime of crew; agencies, commissions, Consular charges, drydocking, painting of the hull of said vessel, furnishing all lines and slings, and pay all other charges whatsoever of every nature, whether of the same kind as hereinabove enumerated or otherwise that may be incurred in or about the use of said vessel during the term of this charter.

SIXTH. The party of the first part shall have the right to appoint the master and chief engineer of said vessel, but the wages thereof shall be paid by the party of the second part. Said master and chief engineer shall be under the orders of said party of the second part as to the management of said ship, but in the event a dispute shall arise between the parties hereto, through the failure of the party of the second part to perform the conditions and agreements herein set forth, then the said master and chief engineer shall be under and subject to the orders of the party of the first part. In the event that there shall be any dissatisfaction on the part of the party of the second part with the master or engineer so appointed during the term of this charter-party,

then said party of the first part will appoint another master and chief engineer in their place and stead.

SEVENTH. It is further understood and agreed that the said party of the first part shall not be liable for injury to or death of the captain, officers, crew, passengers or other persons on or about the vessel or on the wharves, or for any breach of contract of affreightment or transportation between the said party of the second part and third parties, and all liability for any and all of said matters and things shall be borne by the said party of the second part. Said party of the second part shall further protect the [13] said party of the first part against any and all actions for injury to or death of captain, officers, crew, passengers or other person in or about the said vessel, or on the wharves, by securing in the name of the party of the first part a liability policy of insurance, and pay the premium thereon.

EIGHTH. Said party of the second part hereby accepts the said vessel, and agrees to pay for the charter and use of said vessel during the term of this Charter Party, the sum of Twelve Hundred and Fifty (\$1,250) Dollars for the first two months from and after date hereof, receipt of which sum in cash is hereby acknowledged, and to pay the sum of Five Hundred (\$500) Dollars on August 18th, 1915; Five Hundred (\$500) Dollars on September 19, 1915; Five Hundred (\$500) Dollars on October 19, 1915; and One Thousand (\$1,000) dollars per month thereafter on the 19th of each month until the sum of Fifteen Thousand Seven Hundred and Fifty (\$15,750) Dollars has been paid, including said first pay-

ment, and thirty days thereafter to pay the party of the first part the sum of Twelve Hundred and Fifty (\$1,250) Dollars, at which time and upon the payment of the said last mentioned sum, the party of the second part shall be entitled to receive from the International Banking Corporation a Bill of Sale to said vessel, which said Bill of Sale has been this day deposited by the party of the first part for delivery to the party of the second part when all of the conditions and obligations and promises and agreements herein contained upon the party of the second part to be performed have been complied with. The party of the second part agrees to make said payments promptly on the dates mentioned to the said International Banking Corporation for the account of the said party of the first part. In default of such payment, or the failure of said party of the second part within thirty [14] days after incurring the same, to discharge any debts or liabilities incurred by him which are liens on the said vessel, the party of the first part shall have the right to withdraw the said steamer from the service of the party of the second part without prejudice to any claim the party of the first part might otherwise have on the party of the second part for breach of this charter, and the said withdrawal shall not be construed as a waiver of any damages to which the said party of the first part would otherwise be entitled, but said failure to pay and said withdrawal shall be construed as a refusal of said party of the second part to continue the use of said vessel for the balance of this charter.

NINTH. The party of the second part shall not be entitled to any allowance of charter hire during the life of this charter party in the event that the said vessel shall become disabled by the breaking down of the boilers or engines or by injury or damage or breakage of any kind or nature to any part or portion of said ship or her tackle or apparel, and in this connection the party of the second part promises and agrees to blow down the said boilers of the said steamship "South Coast" at least once every forty-five days at the cost and expense of said party of the second part.

TENTH. Said party of the second part further covenants and agrees to and with the party of the first part that if said last payment above mentioned is not made, or any of the prior payments thereto have not been made, then at the option of the said party of the first part the said vessel shall be delivered unto the said party of the first part at San Francisco in as good condition as when received, reasonable wear and tear excepted, with clean holds and free from all liens and claims of every kind or description whatsoever during the term of this Charter Party, except the lien for any salvage services that may be rendered to said vessel, and that he, the [15] said party of the second part, will hold and save harmless the said party of the first part from all liens, claims or demands upon or against the said vessel that may be preferred against the said party of the first part or against the said vessel, and arising or created during the term of this charter party, except any claim for salvage services that

may be rendered to said vessel; and further, will save said party of the first part harmless from all liens, losses, damages, costs or expenses that said party of the first part may sustain or be put to in consequence of such liens, claims or demands, or in respect to any litigation arising out of or in respect thereto or connected therewith.

ELEVENTH. The party of the second part shall not have the right to assign or transfer this charter and/or option to purchase without the consent of the party of the first part.

TWELFTH. Should the steamship "South Coast," during the term of this charter party, save and/or tow, or assist in any way in the salving or towing of any vessel in distress, or save, and/or *two* or assist in salving or in towing any other property, flotsam or jetsam, the party of the first and second parts hereto are to share equally in any money or other property paid or awarded to said steamship "South Coast" by way of salvage and/or towage for such services, after payment of any award to captain, officers and/or crew; time so used to count under this charter.

THIRTEENTH. In the event that said vessel be lost during the life of this charter party, then the party of the second part shall pay the charter hire herein set forth to the party of the first part, notwithstanding such loss, it being understood, however, that the insurance money, if any, shall be paid to the party of the first part on account of said loss, and shall be deducted from the whole amount of said charter hire to be paid under this charter [16].

party, and if there be any difference then remaining, the same shall be paid by the said party of the second part to the said party of the first part. In the event that no insurance shall be collected, then said amount of said charter party shall be paid by said party of the second part to said party of the first part, notwithstanding.

FOURTEENTH. The party of the first part shall have a lien upon all cargoes and all sub-freights, and the cargo money and the sub-freight money for any amounts due under this charter.

FIFTEENTH. It is agreed that the said vessel is to be employed only in strictly neutral trade, and is not to carry explosives, contraband of war or trade to or from ports under blockade or while hostilities are eminent or in progress.

SIXTEENTH. No explosives or goods injurious to the vessel shall be shipped during the currency of this charter party.

SEVENTEENTH. The party of the second part agrees to insure said vessel against total loss for the sum of Twelve Thousand (\$12,000) Dollars, at his own cost and expense, in favor of the party of the first part, and to insure said vessel against war risks, including civil commotions, riots, strikes, etc., for the benefit of the party of the first part.

EIGHTEENTH. It is further stipulated and agreed that said party of the second part shall have the option for eighteen months after signing this charter party, of purchasing the said steamer "South Coast" for the difference between the amount of charter hire earned and paid, and the full amount

of charter hire designated in this charter party, provided always that said option to purchase shall terminate upon the failure of the party of the second part to comply with the terms and conditions in this charter party set forth, and each and all of them. [17]

IN WITNESS WHEREOF the party of the first part by and through its President, first thereunto duly authorized, has set its hand and affixed its official seal, and the said party of the second part has set his hand and seal this 19th day of June, 1915.

SOUTH COAST STEAMSHIP COMPANY.

By JOHN R. ROBERTS,

President.

HOWARD R. LEVICK, Jr. [18]

Due service and receipt of a copy of within answer is hereby admitted this 29th day of December, 1915.

IRA S. LILLICK,

Proctor for Libellant.

[Endorsed]: Filed Dec. 29, 1915. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [19]

Testimony Taken in Open Court.

*In the District Court of the United States for the
Northern District of California, First Division.*

Before Hon. MAURICE T. DOOLING, Judge.

No. 15,939.

J. C. RUDBACH,

Libelant,

vs.

The Steamer "SOUTH COAST," Her Engines,
Boilers, Machinery, Tackle, Apparel and Fur-
niture,

Respondent.

SOUTH COAST STEAMSHIP COMPANY, a Cor-
poration,

Claimant.

Proceedings Had March 14, 1916.

Tuesday, March 14, 1916.

Counsel Appearing:

For the Libelant: IRA S. LILLICK, Esq.

For the Respondent and Claimant: MARCEL
CERF, Esq., and C. H. SOOY, Esq.

Mr. LILLICK.—If your Honor please, this is an action to recover on behalf of J. C. Rudbach, who is the libelant, certain supplies that are alleged to have been furnished between the 11th of August, 1915, and the 1st day of November, 1915, to the steamer "South Coast," which then was in San Pedro. Mr. Rudbach is a ship chandler at San Pedro. The amount he is seeking to recover is

\$1,253.73. As a second cause of action in the libel, there is another claim which has been assigned to Mr. Rudbach from the Marine Hardware Company, amounting to \$145.76; that also is for supplies furnished to the steamer "South Coast" at San Pedro. The other day I telephoned to [20] Mr. Sooy and asked him whether he would be good enough to permit the proof that is offered as to the Rudbach claim to apply to the claim of the Marine Hardware Company, because it would necessitate otherwise my bringing from San Pedro someone from the Marine Hardware Company; may I have that stipulation from the other side?

Mr. SOOY.—You had it over the telephone, and it is good here, Mr. Lillick.

Mr. LILLICK.—In addition to that, I have the stipulation from counsel for the claimant, the South Coast Steamship Company, that in the event that the proof we offer here is sufficient to sustain a decree in favor of J. C. Rudbach, that also as a part of the decree that may be rendered by the Court the Court may also find—I shall read from the stipulation:

"In the event that said steamer "South Coast" shall be held under such decree to be liable to J. C. Rudbach for the materials and supplies furnished to her by him, amounting to \$1,253.73, as prayed for in said libel of J. C. Rudbach, then, and in that event, and as part of the decree entered in the above-entitled cause, the said decree may, and it shall also provide for the entry of judgment against the said steamer 'South Coast' in favor of the following-

named claimants in the amounts specified opposite each of their respective names," and without reading them, there are nine other claimants, whose claims total approximately \$800 in addition to the amount sued for in the libel. I desire to file the stipulation, and dependent upon the decree that the Court shall enter in this case a decree may be entered in it for the various amounts specified in the stipulation.

The COURT.—Are you going to have this testimony transcribed?

Mr. LILLICK.—Yes, I think it will perhaps be necessary; I shall need it in the event that a brief is filed. [21]

Testimony of J. C. Rudbach, for Libelant.

J. C. RUDBACH, called for the libelant, sworn.

Mr. LILLICK.—Q. Mr. Rudbach, you are the libelant in this case? A. Yes.

Q. What is your occupation? A. Merchant.

Q. And as such merchant, what character of goods do you deal in? A. In ship chandlery supplies.

Q. Where is your place of business?

A. San Pedro, California.

Q. Do you know the steamer "South Coast"?

A. Yes.

Q. Do you know where she is registered?

A. In San Francisco—she hails from San Francisco.

Mr. LILLICK.—Will it be stipulated that she is registered in San Francisco?

Mr. SOOY.—Yes.

(Testimony of J. C. Rudbach.)

Mr. LILLICK.—Q. Mr. Rudbach, will you state whether or not, between the 11th of August, 1915, and the 1st of November, 1915, the steamer “South Coast” was at San Pedro? A. Yes.

Q. Did you during that period furnish her with any supplies, provisions or necessities?

A. Yes, I supplied her with considerable supplies.

Q. Captain Rudbach, I hand you a bill dated San Pedro, California, August 11, 1915, for a total of \$192.53, and ask you whether or not you delivered to the steamer “South Coast” at San Pedro about August 11, 1915, the various articles mentioned in that bill? A. Yes, they were all delivered.

Q. Who ordered those goods?

A. Captain Roberts.

Q. Who was Captain Roberts?

A. He was at that time the managing owner of the “South Coast,” and also captain on that trip.

Q. Do you know what official position he occupied with the [22] “South Coast” Steamship Company, whether or not he was an officer of that company?

A. He was president of the South Coast Steamship Company, I understand.

Mr. LILLICK.—We offer that bill in evidence, and ask that it be marked “Libelant’s Exhibit 1.”

The bill is marked “Libelant’s Exhibit 1.”

Q. Captain, I hand you a bill dated San Pedro, California, August 28th, 1915, amounting to \$59.75, and ask you whether or not, upon that date or about that date, you delivered to the steamer “South

(Testimony of J. C. Rudbach.)

Coast," at San Pedro, the various goods mentioned in that bill? A. Yes.

Q. I find a second sheet, with the balance of \$59.75 carried forward on it, and a total on the two bills of \$144.08, and I will ask you whether or not as to the continuation of the other bill, you furnished these supplies to the steamer "South Coast," at San Pedro, California, and whether they were delivered on the vessel?

A. Yes, they were delivered on the vessel.

Q. Upon whose orders?

A. On the captain's orders.

Q. Who was that captain? A. Captain Larson.

Mr. LILLICK.—We ask that these two as one be marked as "Libelant's Exhibit 2," and offered in evidence.

(The bill is marked "Libelant's Exhibit 2.")

Q. Captain, I hand you a bill dated San Pedro, California, September 6, for the sum of \$281.09, and ask you whether or not that bill contains a statement of the goods furnished by you to the steamer "South Coast" at San Pedro, California, on or about that date? A. Yes.

Q. Who ordered the goods specified in that bill?

A. Captain Larson.

Q. Who is Captain Larson?

A. He was captain of the steamer "South Coast."

[23]

Mr. LILLICK.—We ask that that be marked "Libelant's Exhibit 3."

(Testimony of J. C. Rudbach.)

(The bill is marked "Libelant's Exhibit 3.")

Q. Captain, I hand you a bill dated San Pedro, California, October 18, 1915, for the sum of \$157.09, and ask you whether or not about that date you delivered to the steamer "South Coast" at San Pedro, California the articles mentioned in that bill?

A. Yes.

Q. Who ordered those goods?

A. Captain Johnson.

Q. Who is Captain Johnson?

A. He was master on the steamer "South Coast" at the time.

Q. Were the goods delivered upon the vessel, do you know? A. Yes.

Mr. LILLICK.—We ask that this bill be marked "Libelant's Exhibit 4."

(The bill is marked "Libelant's Exhibit 4.")

Q. Captain, I hand you a bill dated San Pedro, California, October 18, 1915, for \$58.96, and ask you whether or not on or about that date you furnished the various articles mentioned in that bill to the steamer "South Coast"? A. Yes.

Q. Were they delivered to the vessel?

A. They were delivered to the vessel.

Q. Who ordered them? A. Captain Johnson.

Q. Who is Captain Johnson?

A. Master on the steamer "South Coast."

Mr. LILLICK.—We ask that that be marked "Libelant's Exhibit 5."

(The bill is marked "Libelant's Exhibit 5.") [24]

Q. Captain, I hand you another bill dated October

(Testimony of J. C. Rudbach.)

18, 1915, for \$361.38, and ask you whether or not you furnished the articles mentioned in that bill to the steamer "South Coast" at San Pedro about that date? A. Yes.

Q. Were they delivered on the vessel?

A. Yes, they were delivered on the vessel.

Q. Who ordered them?

A. That bill, I rather think that Mr. Mills ordered.

Q. I notice upon the bill, "O. K., Captain F. M. Johnson."

A. Yes, he O. K.'d it, it was delivered there; to the best of my recollection, I think Mr. Mills gave me that order, to deliver to the "South Coast."

Q. Who was Mr. Mills?

A. He was agent for the steamer "South Coast."

Q. Did he put this O. K. on the bill at your request, Captain?

A. Yes, I furnished him with a copy of the bill, a duplicate.

Mr. LILLICK.—I offer that in evidence as "Libelant's Exhibit 6."

(The bill is marked "Libelant's Exhibit 6.")

Q. Do you know whether the goods mentioned in that bill were delivered to the steamer "South Coast"? A. Yes.

Q. Why were goods ordered by the steamer, if you know, as to whether it was necessary for furnishing the vessel for her trip?

A. That is what I understand, it was necessary for the vessel to go on the trip, on several trips.

(Testimony of J. C. Rudbach.)

Q. Captain, referring to the bill of August 11th, which is the one O. K.'d by Captain Roberts, and amounting to \$192.53, who ordered that bill of goods?

A. Captain Roberts.

Q. Captain Roberts was whom, with reference to the South Coast Steamship Company?

A. At that time he was master of the steamer "South Coast." [25]

Mr. LILLICK.—Will you admit he was president of the South Coast Steamship Company?

Mr. SOOY.—Yes.

Mr. LILLICK.—Q. What, if anything, did Captain Roberts tell you, Captain Rudbach, as to the liability of the steamer "South Coast" for those bills?

A. Well, he came into the store and gave me these articles of goods and told me to give the best price possible, that he will pay for those goods right away; previous to that, I had furnished some goods for the repair of the steamer, the "South Coast," and he told me the other bill I would have to wait for a trip, but this particular bill of goods he would pay right away.

Q. Was Mr. Sooy at San Pedro at that time?

A. Yes.

Mr. LILLICK.—Mr. Sooy, to save time will you stipulate what your connection with the South Coast Steamship Company was at that time?

Mr. SOOY.—I think I was secretary and also attorney, and possibly part owner.

Mr. LILLICK.—Q. What, if anything, did Captain Roberts tell you about where you should get

(Testimony of J. C. Rudbach.)

your money for those goods?

A. Well, after the goods were delivered, it was late in the evening, I went over with the bills to see Captain Roberts, and he took the bills and checked them over very carefully, and then he took and O. K.'d the bills and told me to go to Mr. Mills, that he had left the money with Mr. Mills to pay me; it was then pretty late in the evening, and I think Mr. Sooy was present at the time.

Q. Then what did you do?

A. Next morning I went to Mr. Mills, there, and told him what Captain Roberts had told me, that he had left money there to pay that bill. [26]

Q. What did he say?

A. He kind of laughed and he said, "Is that what he said"? And I said, "Yes," and he said, "Well,"—he jokingly said, "He is a darned liar, he didn't leave anything here."

Q. Now, subsequent to that the vessel left San Pedro on a trip? A. On a trip.

Q. When she returned, did you make any demand upon Captain Roberts for the amount of these bills?

A. Yes, I went right over to see him about it, and he made several excuses, he didn't have enough money there, that he did not have very much money left over, and he wanted to take as much money as possible to Mexico, that he might need it down there, but he would see to it I would be paid right away; I believe he mentioned that Levick and Oliver would pay the bills.

(Testimony of J. C. Rudbach.)

Q. Did you have any conversation with Captain Roberts, president of the South Coast Steamship Company, as to whom you were holding responsible for the payment of these bills?

A. Yes, I had several times conversations; he always admitted that the steamer "South Coast" would be responsible for the bills; he told me so.

Q. Captain, subsequent to that, and after all of these bills had been incurred, did you have any conversation with Captain Roberts about the payment of the bills?

A. Yes, I told him every time I *saw in* San Pedro, the ship was there, I said the bills were not paid yet, and I needed the money to carry on my business, and he says, "I am more anxious than you are to see those bills paid, because I am responsible for them, and I will see they will be paid, don't worry about it, you will get your money."

Q. You say he said, "I am responsible for them." Did he say anything [27] to you about the responsibility of the steamer "South Coast"?

A. He meant the steamer "South Coast."

Q. You say he meant it? A. Yes.

Q. How do you know that?

A. He said the steamer or owners of the steamer will be responsible for the bills.

Q. Are you sure he said the steamer will be responsible for the bills?

A. To the best of my recollection, yes.

Q. Captain, after the filing of the libel, had you

(Testimony of J. C. Rudbach.)

any conversation with Captain Roberts as to the liability of the steamer "South Coast" for those bills?

A. Yes.

Q. What did he say?

A. Well, he accused me, that I was hasty in libeling the ship there and adding expense, and I told him I could not wait forever to get those bills paid, and I went up to San Francisco and sent the bills to Mr. Sooy, and he told me he would not pay them, or the South Coast Steamship Company would not pay them; and he made the remark, "Well, Mr. Sooy is an attorney, and he wants his lawsuits and litigation, and Lillick is the same way; "If I had been in San Francisco," he said, "this thing would not have happened."

Q. Do you know whether at that conversation he made any remark about the liability of the steamer, itself; for the bills?

A. Yes, he said, "You were afraid you would not get your money out of the ship."

Q. Captain, do you know whether both Captain Roberts and Mr. Sooy knew that you were furnishing these supplies to the steamer "South Coast"?

A. Yes.

Q. Do you remember whether you ever told Mr. Sooy that you were intending to hold the vessel responsible for the bills?

A. No, I don't remember ever having any conversation with Mr. Sooy. [28]

Q. Do you know whether the supplies that you furnished were necessary at that time for the opera-

(Testimony of J. C. Rudbach.)

tion of the steamer "South Coast"?

A. To the best of my knowledge, I think they were necessary.

Q. Had you furnished supplies for her before?

A. Yes.

Q. Had they been paid for? A. Yes.

Q. How had you charged those other supplies?

A. To the steamer "South Coast" and owners.

Q. Would you have supplied any of these articles that you did to the vessel on anything but the credit of the vessel?

A. No. In making the first deliveries of supplies, I specially stipulated that I would not sell to anybody else but the ship and the owners.

Q. Did you ever receive any notice of any kind or character from either Captain Roberts or Mr. Sooy, before you furnished these bills, that the vessel, itself, was not responsible for them? A. No.

Cross-examination.

Mr. CERF.—Q. How soon after Captain Mills said that Captain Roberts was a darned liar, or damned liar, whatever he said, did you see Captain Roberts?

A. I should judge about a week or so, when he came back on the trip.

Q. Didn't you see him afterwards, and before he went on the trip to Ensenada?

A. Yes, I saw him before, and I saw him after.

Q. I mean after you saw Captain Mills and Captain Mills told you that Captain Roberts was a damned liar did you see Captain Roberts before he went to Ensenada?

(Testimony of J. C. Rudbach.)

A. No, he was on his way to Ensenada at that time.

Q. When Captain Roberts came back from Ensenada, did you tell him that Mills said he was a damned liar? A. No.

Q. What did you tell him about the conversation you had with [29] Mills?

A. Well, I told him, I said, "You told me to go to Mills, that you had left money there, and Mills says you didn't leave a cent there," and he kind of made excuses, he did not have very much money, and he needed to take money to Mexico, and I said, "That is no way to treat a person, trying to put one over on him."

Q. You really thought he was trying to put one over on you? A. Yes, that is what I thought.

Q. You honestly believed that he was trying to decieve you at that time?

A. Yes, while he was on the trip there; when he gave me the excuses he made after he came back, I thought it might be all right.

Q. What excuses did he make?

A. That he didn't have very much money, and he thought he might need it all in Mexico.

Q. Anything else?

A. No, I don't remember anything else.

Q. You did not lose such confidence in him that you refrained from extending further credit to him thereafter, did you? A. No.

Q. Notwithstanding what Mr. Mills told you about his being a damned liar?

A. I didn't take that very seriously, as I said; Mr.

(Testimony of J. C. Rudbach.)

Mills said that more in a joking way.

Q. Just a joke? A. Well, kind of, yes.

Q. Then, as a matter of fact, you didn't think he was trying to put something over on you; you thought that was a joke?

A. No—I did think he was trying to put one over on me.

Q. Notwithstanding you thought he was trying to put something over on you, you continued to extend credit to him to the extent of about a thousand dollars? A. Yes.

Q. Now, as a matter of fact, Mr. Rudbach, the day that Captain Roberts ordered these goods from you was by no means the first day that you had any transaction connected with the “South [30] Coast,” was it? A. No.

Q. Certainly not? A. No.

Q. For a period of several months you had been furnishing goods to the “South Coast,” hadn't you?

A. I don't know whether it was several months, but I suppose it was one or two months, anyway.

Q. Two months, anyway? A. Yes.

Q. Do you remember the first time that you were asked to supply materials to the “South Coast”?

A. Yes.

Q. You remember the place? A. Yes.

Q. You are sure you remember the place?

A. Yes.

Q. It was at a restaurant, was it not? A. No.

Q. Are you sure it was not? A. No.

Q. Do you remember of having met a man by the

(Testimony of J. C. Rudbach.)

name of Levick? A. Yes.

Q. Do you remember the first time you met Mr. Levick? A. Yes.

Q. Are you sure you do? A. Yes.

Q. Who presented Mr. Levick to you?

A. Mr. Mills.

Q. Where was it?

A. I think that was in a restaurant.

Q. Keep that in your mind for a minute. You were sitting down, Captain Mills was sitting down, and Levick was sitting down?

A. No, I was not sitting down.

Q. You were standing up; you were in the restaurant, anyway? A. Yes.

Q. I want you to tell the Court what Mr. Mills said to you when he presented Levick to you—about furnishing supplies and materials to the “South Coast.”

A. He didn’t say anything that I remember about supplies at that time.

Q. Just press your recollection a little bit.

A. To the best of my recollection, I was sitting in the restaurant [31] at another table, when I saw Mr. Mills over there, and I had supplied the “South Coast” with some stuff already, and I went over to Mr. Mills and asked him at what time they expected the “South Coast” to get away, and Mr. Mills said, “I don’t know; as soon as she gets ready,” and at that time he introduced me to Mr. Levick, and I told Mr. Levick, I believe, I was in the habit of, that I was supplying the ship at that time, and the con-

(Testimony of J. C. Rudbach.)

versation drifted along there about supplies that she would need when she started out, and I told him I was in a position to supply the ship with all the necessities that he needed.

Q. Whom did you say that to?

A. I said that to Mr. Mills and Mr. Levick.

Q. Of course, there was no occasion for your saying it to Mr. Mills; you had known Mr. Mills for many years? A. Yes.

Q. You said it to Mr. Levick, then? A. Yes.

Q. Why did you say it to Levick?

A. At that time, Mr. Mills said Mr. Levick was operating the ship, and that probably he would be buying those goods.

Q. That was the time when Mills told you that Levick was operating the "South Coast"?

A. Yes.

Q. And that probably he would require some goods and some supplies? A. Yes.

Q. Now, you solicited the business, naturally, from Levick? A. No.

Q. Of course, you were not adverse to furnishing the materials?

A. I did not furnish anything to Mr. Levick.

Q. We will let the Court decide that, Mr. Rudbach. You said to Mr. Levick that you were in the business of furnishing supplies to ships? A. Yes.

Q. And you told him that you would like to furnish supplies to the "South Coast"? A. Yes.

[32]

Q. You told that to Mr. Levick? A. Yes.

(Testimony of J. C. Rudbach.)

Q. Knowing Mr. Levick was operating the "South Coast"? A. Yes.

Q. What did Mr. Levick say?

A. Mr. Levick said, "It will all depend upon the price," that he would give me a chance to figure on it.

Q. Anything else?

A. Nothing that I remember.

Q. You probably said you would make the price right; you would do as well as you could?

A. Probably I did.

Q. As a matter of fact, you were anxious for the business, were you not?

A. Yes, I was anxious for the business.

Q. How long had you known the "South Coast" at this time?

A. Well, about probably three or four months, something like that.

Q. Never had heard of the ship before that?

A. Oh, yes; I have known the ship, the "South Coast," for a number of years.

Q. That is what I mean, you have known her for quite a number of years? A. Yes.

Q. During this period of a number of years, did you know who her owner was?

A. No, not exactly.

Q. What do you mean by "not exactly"?

A. I did not know exactly who her owners were until I inquired from Mr. Mills and Captain Larson.

Q. During this period of several years, you didn't know who owned the "South Coast"?

A. No, I did not.

(Testimony of J. C. Rudbach.)

Q. You did not find that out until you asked Captain Mills and Captain Larson? A. Yes.

Q. Whom did you ask first, Mr. Mills or Captain Larson? A. Mr. Mills.

Q. When did you ask him that?

A. As soon as the "South Coast" arrived down in San Pedro for repairs.

Q. That was the time that Mr. Mills gave you a little order [33] for \$5 or \$6 worth?

A. No, he gave a considerably bigger order.

Q. A bigger order than that, was it?

A. Yes. I could relate the conversation.

Q. It was the first order anyway?

A. Yes, he gave me the first order the following day; he did not give me any order at that time; I went over there to solicit the order, but he did not give me any order at that time, but he telephoned to me an order the next day or the day following.

Q. This is what I am getting at: The day that you went over to solicit business from Mills, Mills told you that the South Coast Steamship Company was the owner of the "South Coast"? A. Yes.

Q. There is no question about that, is there?

A. No. I don't remember whether he said the "South Coast Steamship Company," but he said Roberts and Sooy—he mentioned Mr. Sooy's name—are the owners.

Q. Roberts and Sooy? A. Yes.

Q. He did not say anything about any company at all?

A. About the South Coast Steamship Company?

(Testimony of J. C. Rudbach.)

Q. Yes.

A. I can't remember that; I have no recollection; I could not swear; he may have said it and he may not.

Q. But you do remember that he said Roberts and Sooy? A. Yes, I do remember that.

Q. That was the day that you solicited the business from Mills? A. Yes.

Q. You did not get any business, though, from him, did you? A. No, not that day.

Q. You never had met this man Levick up to that time, had you?

A. I did not meet him at that time; I did not meet him until a week or a couple of weeks later. [34]

Q. A couple of weeks later was the first time you ever met him? A. Yes.

Q. That was the first time that you knew that Levick was in charge of the operation of the boat?

Mr. LILLICK.—Objected to upon the ground the witness has not testified that Levick was in charge of the boat, and assuming a fact not in evidence.

The COURT.—That was not the exact language he used, but he did say that—what was it they told you, that Levick was operating the boat?

A. Yes, that he was going to operate the boat.

Mr. CERF.—At this conversation at the restaurant, Mr. Mills told you that Mr. Levick was the man who was going to operate the boat?

A. Yes.

Q. And then you turned to Levick and told him

(Testimony of J. C. Rudbach.)

that you would like to furnish the materials and supplies? A. Yes.

Q. Now, this is the situation, isn't it, Mr. Rudbach: Before you met Levick, Mills had told you, you believe, that Roberts and Sooy were the owners of the boat? A. Yes.

Q. And when you did meet Levick, you were told by Mr. Mills that Levick was the man who was operating the boat? A. Yes.

Q. Mr. Mills did not tell you, as far as you remember now, that the owner of the boat was a corporation, did he?

A. No, I don't believe that he ever told me.

Q. Who was the first man that told you that the owner of the "South Coast" was a corporation?

A. Captain Larson.

Q. Are you sure it was Captain Larson?

A. Yes.

Q. You are absolutely positive about that?

A. That is the best of my recollection, positive almost.

Q. If you remember it, you must remember the fact of his saying so and perhaps you remember where it was he told you? [35]

Mr. LILLICK.—Objected to as argumentative, and a compound question.

Mr. CERF.—I will withdraw it.

Q. Do you, as a matter of fact remember that Captain Larson did tell you that the owner of the "South Coast" was the South Coast Steamship Company?

(Testimony of J. C. Rudbach.)

A. Yes, and that Captain Roberts was the president.

Q. Do you remember where that was, when he told you that? A. That was in my store.

Q. Do you remember when it was?

A. Well, he was up there giving me an order for some goods, and that is the time I asked him who owned this vessel.

Q. There is no doubt about that, either?

A. No.

Q. He told you the owner of the vessel was the South Coast Steamship Company, and that Captain Roberts was the president? A. Yes.

Q. And he told you that on the day he ordered some goods?

A. Yes, he ordered some goods that day.

Q. You are sure about it? A. Yes.

Q. Which goods were they?

A. Well, they are not goods that are in these bills; that was goods that were bought previously, which were paid for.

Q. You are sure of that? A. Yes.

Q. These goods have all been paid for?

A. Yes.

Q. Who paid you? A. Mr. Mills.

Q. Do you know where he got the money to pay you for them?

A. I rather think he got it from the Pacific Warehouse and Storage Company; it was a check.

Q. You know what I mean, Mr. Rudbach?

Mr. LILLICK.—I object to that insinuation of

(Testimony of J. C. Rudbach.)

counsel, if your Honor please. [36]

Mr. CERF.—I beg your pardon, Mr. Rudbach, and Mr. Lillick's. I will withdraw that. Let me ask you: Do you know whether or not the money that he gave you to pay you for the goods that were ordered by Larson was the money which he got from Levick?

A. Well, I don't know, but perhaps he did.

Q. Just tell me what your best judgment is in the matter.

A. It is my judgment, I rather think he did, but I would not swear to that that he did; I don't know whether he did.

Q. Upon what do you base your judgment in that regard? What makes you think he got the money from Levick?

A. In fact, I don't think he did get it from Levick.

Q. What do you think about it?

A. I rather think he got it from somebody else on notes.

Q. Whose notes?

A. I don't know; I never saw them; just at different times in conversation, I got this opinion, but I don't know a great deal about it; I don't know very much.

Q. Your judgment is that it was Levick's money that paid you for the goods?

A. No, it is not my judgment that it was Levick's money; I think it was somebody else's money.

Q. Were you mistaken a moment ago when you said it was your judgment that it was Levick's money? A. I was mistaken if I said so.

(Testimony of J. C. Rudbach.)

Q. What position did Mr. Mills occupy with respect to this ship, do you know?

A. He was acting agent for the steamer "South Coast."

Q. Did he tell you so at the time that you had the conversation about Levick? A. No.

Q. When did he tell you so?

A. He told me when the steamer first arrived at San Pedro.

Q. Did he tell you for whom he was acting as agent?

A. For the steamer "South Coast." [37]

Q. Did he tell you he was to operate the "South Coast"? A. Yes.

Q. What did you say?

A. I went over there, as I said, to solicit business, as I understood that Mr. Mills was agent for the steamer "South Coast"; for that reason I went over to him; when I went over, he told me then that Captain Roberts and Sooy had asked him to look after the boat, and he told me that Levick and Oliver were going to operate her, and that Sooy had written him not to have any bills go on the ship's account, that Levick and Oliver will pay those bills; I told him it was immaterial to me who paid those bills, but I would not sell my goods to the ship any other way than charging them to the ship or her owners, and if he did not want it that way I would not deliver any goods.

Q. Now, as a matter of fact, did Mr. Mills at that

(Testimony of J. C. Rudbach.)

time read to you or show to you a letter that he had from Mr. Sooy? A. No.

Q. He did not?

A. No. He pulled out, to the best of my recollection, from the pigeon-hole a letter, but he didn't give it to me to read, and he didn't read it before me; I didn't know what the contents were.

Q. But he told you that Mr. Sooy and Captain Roberts, the owners of the vessel, insisted that if any materials or supplies were furnished to the vessel, they should be furnished on the credit of the people who were going to operate her, Levick and Oliver?

A. Yes.

Q. He told you before you ever furnished a cent of material to that vessel?

A. Yes, but he withdrew that the next day.

Q. But he told you that Captain Roberts and Sooy had told him that?

A. That Mr. Sooy had written to him.

Q. That Levick and Oliver had a charter on the vessel? A. Yes.

Q. Did he show you a copy of the charter-party?

A. No.

Q. Did you ever see a copy of the charter?

A. Not until the [38] other day, in Mr. Lillick's office.

Q. Did you ever ask Mills to show you a copy of the charter-party? A. No.

Q. Did you ever ask Captain Roberts to show you a copy of the charter-party? A. No.

(Testimony of J. C. Rudbach.)

Q. Did you ever ask Mr. Lillick to show you a copy of the charter-party? A. No.

Q. Did you ever ask Mr. Sooy to show you a copy of the charter-party? A. No.

Q. Did you ever ask Captain Larson to show you a copy of the charter-party? A. No, but—

Q. (Intg.) Did you ever ask anybody?

Mr. LILLICK.—I submit that the witness should be allowed to finish his answer.

The COURT.—Yes.

A. I asked Captain Larson whether he knew who the ship was chartered to, and he told me no, he didn't know, that he didn't have a copy of the charter-party.

Mr. CERF.—Q. Was that upon the same occasion that he told you that Captain Roberts was the president of the South Coast Steamship Company?

A. Yes, that was the same occasion.

Q. That was before any of the goods were ordered for which the bills are now in court? A. Yes.

Q. Then, as a matter of fact, Mr. Rudbach, the first time that you knew that Levick, or Levick and Oliver were interested in the operation of this steamship was not the day that you met Levick in the restaurant, but the day that you went over to Captain Mills to solicit the business? A. Yes.

Q. It was on that day that you knew that the operation of the steamship was in the hands of the charterers, Levick & Oliver?

A. Yes, that is what I understood from Mr. Mills, that Levick [39] & Oliver had chartered the ship.

(Testimony of J. C. Rudbach.)

Q. Did you understand who were to be the agents of these charterers Levick & Oliver?

A. No; I did not make any further inquiries; I didn't know who Levick was, anything at all.

Q. This is what I want to explain: If you went to Mills to get the business, and Mills told you that the ship was under charter to Levick & Oliver, or to Levick, and you persisted in soliciting the business from Mills, then you considered, did you not, that Mills was the agent of Levick & Oliver?

Mr. LILLICK.—Objected to upon the ground it is not binding on the libelant, and irrelevant, immaterial and incompetent.

Mr. CERF.—My object entirely in asking that question is to find out what was in the mind of the libelant.

The COURT.—The objection will be overruled.

Mr. CERF.—Q. Do you understand the question?

A. Yes. I wish you would repeat the question.

(Last question repeated by the reporter.)

A. No, when I went to Mills, I did not know that he was agent.

Q. I understand—

Mr. LILLICK.—Pardon me. The witness is not through with his answer. Let him finish.

A. (Continuing.)—All that I knew was that he was agent for the steamer, and I went to solicit business from the steamer, consequently I went to him, and after we talked things over, it would be necessary for me to explain, to state the conversation at that time; it might be more clear.

(Testimony of J. C. Rudbach.)

Q. Go on, give us the conversation.

A. When I spoke to Mr. Mills at that time and told him I would not sell the goods to anybody else, to the charterers, Levick & Oliver, or whoever [40] it might be, that I would sell it to the ship, and hold the ship and owners responsible, Mr. Mills told me that Mr. Sooy and Mr. Roberts could not expect otherwise, that anybody would furnish goods to anybody that they did not know, and that the ship will have to be responsible for them. At any rate, he said, "I won't do anything until Roberts gets here; I expect him here in a day or so, and I will tell him to come up and take the matter up with you." Then the next day, or the day after, he telephoned to me to send over some oakum, I believe the carpenters were there working, and he said, "Charge this to the ship, and if Captain Roberts wants it otherwise, he can take it up with you," and that is the way the business started.

Mr. CERF.—Q. Mills told you to charge it to the ship? A. Yes.

Q. You are sure about that? A. Yes.

Q. That was the first order you got?

A. That is the first order I got.

Q. So, with respect to the first order that you got, you are perfectly sure that you depended exclusively upon the ship? A. Yes.

Q. No doubt at all about that?

A. No doubt at all.

Q. Don't you remember that Mr. Mills, himself, guaranteed payment of that first bill?

(Testimony of J. C. Rudbach.)

A. He might have; yes.

Q. Don't you remember that he did?

A. I don't remember; I don't know.

Q. You don't remember that he guaranteed payment of that, but you know he said to charge that to the ship? A. Yes.

Q. And you looked to the ship for your payment?

A. Yes.

Q. You must remember he didn't guarantee it, don't you?

A. I could not swear to it; he might have guaranteed that, or [41] said if Roberts did not want to pay for it, he would pay for it, or something to that effect, but I don't remember.

Q. You don't remember anything like that?

A. No.

Q. But you do remember that he told you about charging it to the ship? A. Yes.

Q. Do you remember the first time you met Mr. Sooy?

A. It was somewhere about that time, when the steamer was getting ready to go to Ensenada.

Q. Have you a picture of Mr. Sooy coming into your shop?

Mr. LILLICK.—That is objected to, if your Honor please.

The COURT.—Ask him the question. It does not make any difference whether he has a picture of him, or not.

A. I believe Mr. Sooy was in the store.

(Testimony of J. C. Rudbach.)

Mr. CERF.—Q. Was that the first time you ever met Mr. Sooy?

A. That is the first time I ever met him, that I ever saw him.

Q. The first time you ever saw him was in your store, was it not? A. Yes.

Q. Do you know what time of day or night it was?

A. No, I can't remember, I don't know; I remember he was in there with Captain Roberts, to the best of my recollection.

Q. Do you remember whether it was before or after you had delivered the goods to the "South Coast" this first bill which has been introduced in evidence here? A. I rather think it was before.

Q. Let me see if I cannot refresh your recollection in that regard: Don't you remember that Mr. Sooy came to your shop, and that the goods were all packed, ready to be sent over to the "South Coast"? A. Yes, maybe they were.

Q. Don't you remember it, Mr. Rudbach?

A. Yes, I think they were. [42]

Q. That is a fact, isn't it? A. Yes.

Q. The goods were there in your store, and Mr. Sooy came over? A. Yes.

Q. Do you remember what Mr. Sooy said to you about these goods?

A. He didn't say anything to me.

Q. Are you sure about that? A. Positive.

Q. I am going to put this question to you: I want to know if on that occasion, you and Mr. Sooy and Captain Roberts being present, Mr. Sooy did not say

(Testimony of J. C. Rudbach.)

to you, in substance or effect, "Now, Mr. Rudbach, in order that there may never be any misunderstanding about these goods, I want you to know that you are not to deliver them to that ship unless you are looking to Levick & Oliver for their payment"?"

A. Absolutely not.

Q. You are sure about that?

A. I am positive about that. I never spoke a word to Mr. Sooy; I do not believe, all the time he was in San Pedro, to my recollection—yes, I did; I think the only words I ever spoke to him were when I had a little lunch down in the cabin aboard the "South Coast"; I never have been introduced to Mr. Sooy to this date, and I didn't know who he was; I know he was along with Captain Roberts, but I didn't know that was Sooy, or the Sooy that Mr. Mills had reference to until I asked Captain Larson, and he told me that it was Mr. Sooy, a partner of Captain Roberts.

Q. Captain Larson told you it was Mr. Sooy?

A. Captain Larson; I didn't know that was Mr. Sooy when he was in with Roberts at the time; I think there was some conversation that I had with Captain Roberts about some rope that he had bought in San Francisco, that I told him I could have sold him as cheap in San Pedro as he bought it in San Francisco, and paying the freight down there, and he says, "I didn't know you had two coils of such large rope in stock, and Henry is a very good friend of [43] mine, and I ordered from Henry."

Q. Anything else at that time that was talked

(Testimony of J. C. Rudbach.)

about? A. Not that I remember.

Q. You don't remember anything else was talked over at all on that occasion? A. No.

Q. What did Captain Roberts and Mr. Sooy come into your store for?

A. I don't know; probably Captain Roberts came in there and put a little addition to the order, or something of that sort.

Q. Now, these goods were all ready to go on the ship?

A. Yes, and as is very often the case, they forget something and come in and order a little more.

Q. You have no recollection of anything that was done, at that time, except the fact that you chided Roberts for having ordered rope from Henry instead of you?

A. Yes, it kind of impressed me, having had quite a little bit of business there, that I felt I ought to have it.

Q. When did you first find out that that rope had come down there?

A. I saw it aboard the steamer.

Q. When?

A. Over at the "South Coast," over across the bay.

Q. I want to know when it was you saw that rope on the "South Coast"?

A. Captain Roberts, whether he telephoned to me or asked me that morning to go over there, I don't remember, but he wanted me to look over the life-boats, which were just about to be inspected, and to

(Testimony of J. C. Rudbach.)

go over there and look over the life-boats and see that there was everything that was necessary to equip the life-boats to pass inspection, an oar or such a thing, so he wanted me personally to go over there and see about these things, and I went over, and that is the time I found the rope there, and at that time he gave me some order, and he asked me also to get an electrician for him there, saying, "Old man, you will do [44] that for me, and I will remember you," and so forth.

Q. Was that before he had given you the order for these goods?

A. It may be it was before or it may be it was after; it was about that time; I couldn't remember.

Q. Was it before?

A. It was just about that time.

Q. As a matter of fact, how many days before these goods were delivered aboard the ship did Captain Roberts order them?

A. I guess he ordered them one day and I guess they were delivered the next day, if not the same day.

Q. Have you any recollection in that regard, any positive recollection?

A. I am positive it was not very long.

Q. Between the order and the delivery?

A. Yes. It was not very long between the order and the delivery. I think they came in there in the evening and gave me the order, and it was delivered the next day.

Q. That is your recollection of it? A. Yes.

(Testimony of J. C. Rudbach.)

Q. And it was before you got that order from Captain Roberts that you saw this rope aboard the ship, was it?

A. Yes; it must have been; I was over there.

Q. At the time that Captain Roberts gave you the order, he came over to your store and gave it to you?

A. Yes.

Q. You did not chide him at that time for having failed to give you the order for the rope, did you?

A. No.

Q. It was not until the next day, at least the next night, that he came with Mr. Sooy, that you talked to him about the rope?

A. Well, that might have been the next night, and it might have been the day before; I don't know; I couldn't remember now the exact date or the day; I know it was just about that time.

Q. You know that you did not talk to him about the rope when Mr. Sooy was there, don't you?

A. Yes.

Q. You know that he gave you the order before Mr. Sooy was there, [45] don't you, because it was already made up?

A. I don't know whether Mr. Sooy was in San Pedro at that time.

Q. Before he was in your store?

A. He might have been in San Pedro, I don't know.

Q. But in your store, I am talking about; as I understood your testimony, Captain Roberts and

(Testimony of J. C. Rudbach.)

Mr. Sooy came into your store casually one evening, and went—

Mr. LILLICK.—I object to the word “casually.”

Mr. CERF.—Came into your store one day?

A. Yes.

Q. And all you remember of the conversation was that you complained, or rather suggested to Captain Roberts that he might have given you the order for the rope, instead of to Henry? A. Yes.

Mr. LILLICK.—The witness also testified that he was absolutely positive that Mr. Sooy did not say at that time, “You are not to look to the vessel for these goods.” Counsel has put into the witness’ mouth by this question the fact that is all he remembers. The witness’ attention has not been called to the other statement he made; he has absolutely denied that Mr. Sooy made that statement. I think the question is misleading.

Mr. CERF.—Q. You remember, Mr. Rudbach, that when Captain Roberts and Mr. Sooy came into your store, that the only thing that was discussed was the rope?

A. There might have been other things discussed.

Q. But that is the only thing you remember?

A. That is the only thing I remember with regard to; he might have spoke of little things, or something of that sort.

Q. But you cannot remember that? A. No.

Q. You know that at this time that Mr. Roberts and Mr. Sooy were there, when you talked about the

(Testimony of J. C. Rudbach.)

rope, that was subsequent [46] to the time that Captain Roberts had given you the order?

A. It might have been, I don't know.

Q. You told me, did you not, a little while ago, that the order was all made up on the floor of the store ready to be delivered when Captain Roberts and Mr. Sooy came in.

A. I didn't mean to say that the stuff was ready in there; you told me that the stores were made up; I said they might have been; I don't remember. They might have been made up at that time; I don't remember exactly whether that was said before he gave me the order or after, but it was just about that time.

The COURT.—The important thing is the fact that Mr. Sooy told him this, whether it was before the order was given, or before the goods were delivered.

Mr. CERF.—Q. Captain Rudbach, will you tell me how close to the "South Coast" your store—how close to the place where the "South Coast" was lying is your store? A. It is quite a distance.

Q. Quite a considerable distance, is it not?

A. Yes, it is across the bay.

Q. As a matter of fact, you have to take the ferry boat to go over there, don't you? A. Yes.

Q. You have to go over a sand spit? A. Yes.

Q. And it is a rather inconvenient thing for a big man to go from where the "South Coast" was lying?

A. It is quite a considerable walk, it is a board walk.

(Testimony of J. C. Rudbach.)

Q. You have to take the ferry boat, also?

A. Yes; that is just a little trip across the channel.

Q. Are you just as positive now as you were a little while ago, that Mr. Sooy did not—

A. (Intg.) I am absolutely positive, I do not believe I ever exchanged a word with Mr. Sooy outside, as I said, of that cabin, when we were having a little [47] lunch.

Q. Then you did have lunch with him in the cabin of the "South Coast"?

A. Yes, that is that evening that he left for Ensenada.

Q. That was the evening of the night that they left for Ensenada? A. Yes.

Q. That was after your goods had been delivered?

A. Mr. Sooy made some casual remark about sailors getting drunk, and it being hard to get a crew, but there was nothing mentioned about business either way.

Q. When Sooy came into the store with Roberts, didn't Roberts present his friend Sooy to you?

A. No.

Q. Didn't introduce him at all?

A. No, that is what I said before, I have never been introduced to this day to Mr. Sooy; I didn't know who Mr. Sooy was.

Q. By lunch, you mean something to eat?

A. Something to eat; it was late in the evening when I brought these bills over there, and Roberts says, "Have you had something to eat," and I said, "No," and he said, "Go down and get something to

(Testimony of J. C. Rudbach.)

eat"; they were having supper, and I went down and had a little to eat.

Q. That was the time you talked with Mr. Sooy?

A. Mr. Sooy was sitting at the table at the time.

Q. These payments that you got for the goods that were paid for, and that were delivered to the "South Coast," were payments made in the form of checks? A. Yes.

Q. By Captain Mills in every instance?

A. Mr. Mills.

Q. Mr. Mills in every instance? A. Yes.

Q. Mr. Rudbach, did you ever present a bill to the South Coast Steamship Company for any of these goods?

A. I presented them to Captain Roberts, the president of the South Coast Steamship Company, and he told me to bring it over to Mr. Mills. [48]

Q. Beside the bill that Captain Roberts put his name on and told you to take to Mr. Mills, did you ever present any bill to Captain Roberts?

A. Outside of this, no; he told me to leave it to Mr. Mills; the captain told me to bring it over to Captain Mills and he will take care of it.

Q. So that outside of the bill you gave to Captain Roberts to put his name on, and which he did put his name, and which he told you to take to Mr. Mills for payment, you never presented any bill to Mr. Roberts? A. No.

Q. Nor Mr. Sooy? A. No.

Q. Nor to anybody else connected with the South Coast Steamship Company?

(Testimony of J. C. Rudbach.)

A. Except their agent, Mr. Mills, and the captain.

Q. The captain and Mr. Mills?

A. Yes. I didn't know where the South Coast Steamship Company's headquarters were.

Q. You didn't know that? A. No.

Redirect Examination.

Mr. LILLICK.—Q. Captain Rudbach, are you absolutely positive that Mr. Sooy did not tell you that the vessel would not be responsible for these bills?

A. I am absolutely positive of that.

Q. You are under oath; this is a very serious thing.

A. Well, I am absolutely positive that I never spoke to Mr. Sooy until that time in the cabin aboard the "South Coast," as I told you; I was never told by anybody that the ship would not be responsible for them, excepting that conversation with Mr. Mills, at the first time, and later on, Captain Larson spoke about it, made reference to it.

Q. Mr. Sooy and Captain Roberts did come in your store that evening there at San Pedro, did they?

A. I don't know whether it was the evening or afternoon; it was about that time they came in there, and Captain Roberts gave me some more orders, [49] or I believe there was something he came in for, and I talked to him.

Q. Did you have a conversation with Mr. Sooy at all on that occasion? A. Not at all.

Q. You recognize Mr. Sooy sitting here at the table as the gentleman who was in there with Captain Roberts? A. Yes.

(Testimony of J. C. Rudbach.)

Q. What were Mr. Sooy and Captain Roberts doing upon that vessel then, Captain?

A. Well, I did not see very much of Mr. Sooy on the vessel there, and several times I went over; whenever I saw Captain Roberts, he was going around there and fixing up things, and ordering hands around like naturally a man connected with a ship would do, an owner.

Q. What did Captain Roberts tell you they were going to do with the steamer on that trip to Ensenada?

A. They would not tell me anything; they did not tell me anything.

Q. What were they doing, if anything, upon the chartered vessel going down there, if they were not interested in it?

A. I don't know; it was kind of kept secret; they did not tell me what they were going for; they told me they were going on a short trip and would be back in about a week.

Q. The vessel was being repaired at that time, was she not? A. Yes, she was completed.

Q. Who was superintending these repairs?

A. Captain Larson, he was around there, and other times Captain Roberts was there, he was superintending it, as I seen whenever I went over there.

Q. By "superintending," what do you mean? What was Captain Roberts doing about the repairs?

A. Of course, I was not over very much; occasionally I had to go over there, and I saw him ordering hands around and telling them what to do, the car-

(Testimony of J. C. Rudbach.)

penter, the men that were working on board.

Q. Do you know whether Mr. Sooy had come down with the "South [50] Coast" when she was towed down? A. How is that?

Q. Do you know whether he came on the steamer "South Coast," or whether he came down by train?

A. No, I did not see Mr. Sooy for a long time afterwards, until she was almost ready to go to sea; as I said, it was a day or so before she went to Ensenada.

Q. At any rate, Mr. Sooy and Captain Roberts went out with her on that trip down to Ensenada?

A. I could not swear to that; I think they did.

Q. And Captain Roberts at that time was captain of the vessel, as well as being the president of the steamship company? A. Yes.

Q. You were asked upon your cross-examination about a conversation that you had with Mr. Mills when counsel asked you about a letter, and Mr. Mills calling your attention to a letter; you testified that you had not had that letter read to you; in one of your replies you said, he withdrew that notice the next day. What do you mean by that?

A. Well, he said that he would not order any goods until Captain Roberts came down and he had seen him, and he would take it up with me himself.

Q. He told you that he had received a letter from Mr. Sooy?

A. Yes, he had received a letter from Sooy, saying they didn't want to have anything charged to the ship, and when I explained to him I would not sell any goods otherwise unless they were charged to the

(Testimony of J. C. Rudbach.)

ship and owners, he said, "Mr. Sooy and Mr. Roberts could not expect anything otherwise," but he said, "I won't order anything at this time, but Captain Roberts will be down in a day or so, and he will take it up himself"; the next day he telephoned to me to send over oakum, and to charge it to the ship, and if Roberts wanted to do otherwise he could take it up with me.

Q. What, if anything, do you know about Mills having acted [51] there as the representative of Captain Roberts or Mr. Sooy on the steamer "South Coast"?

A. Well, Mr. Mills told me that Sooy had written to him and told him to look after the "South Coast."

Q. Did he while the "South Coast" was at San Pedro look after her and see about the repairs?

A. Yes, sometimes he ordered the goods, he telephoned, and other times the captain came in and ordered them; other times Captain Roberts ordered them.

Q. And he told you that Roberts and Sooy had asked him to look after the boat, didn't he?

A. Yes.

Q. After the return of the "South Coast" from Ensenada, when you saw Captain Roberts about the bills that he said he had left the money with Mills to pay you for, what did he say to you about the liability of the steamer "South Coast" for that bill?

A. Well, he said that I need not worry, that would be all right, I would be paid for it, that he was at that time short of money, and he did not have any

(Testimony of J. C. Rudbach.)

money to pay for it, but it would be all right, it would be paid.

Q. Did you charge Captain Roberts with the trick he had played upon you in telling you that the money would be at Mills' for you? A. Yes.

Q. What did he say?

A. "Well," he says, "old man, you don't understand these things; you see I did not have very much money to go down to Mexico, and I thought probably I had better take it along with me, I might need it, and you will get paid, I will see that you get paid for it," or that Levick & Oliver will pay it.

Q. What did Captain Roberts say, if anything, to you, about going to Ensenada?

A. He did not tell me anything about going to Ensenada.

Q. Did you hear anything about a cargo of ties that would be [52] brought back?

A. I believe Mr. Mills spoke something about a cargo of ties, that the ship was going to Mexico and would bring back ties.

Q. Didn't you ask Roberts what he was going down to Mexico for—did you say anything to him about that at all?

A. No, I don't remember of ever asking him anything; I could understand that he did not want to say anything regarding his trip, and I didn't question him very much; I thought it was none of my business to know where the ship was going.

Q. Do you remember an occasion when Captain

(Testimony of J. C. Rudbach.)

Larson ordered some goods; do you remember Captain Larson ordering some goods? A. Yes.

Q. You remember having the conversation with Roberts at that time in which you told him you were looking to the ship for your payments? A. Yes.

Q. Do you remember saying at that time, "Captain, what will I do if the ship is lost"?

A. Captain Larson was present at the time, and she was going away, just about ready to go away, and I told Captain Roberts at that time, I said, "Captain, all I have to look to is the ship for my pay, and in case of the ship going away and anything happens, you would not feel like going down in your pocket, perhaps, to pay my bill, and I would like to know whether the ship is insured," and he held up his hands and he said, "Captain, don't worry about it, old man, I will look to that; she is well insured, and you are well protected."

Q. Captain Roberts knew at that time that you had furnished all of these goods to the vessel, didn't he?

A. Yes—not all of them.

Q. Up to that time, that had been furnished up to the time of that conversation? A. Yes. [53]

Q. Now, after that time, Captain Rudbach, and after all of your bills that are here had been rendered and the materials furnished did you have any conversation with Captain Roberts about payment of those bills?

A. Yes; as I said here, after I had libeled the ship and got back to San Pedro, I met Captain Roberts there and he accused me of being hasty in libeling

(Testimony of J. C. Rudbach.)

the ship, that I needn't worry that I would not get my money; he says, "You are afraid you won't get your money"; he says, "The ship is good for it"; that is the remark he made, and that Mr. Sooy was an attorney, and all the attorney wanted was litigation and lawsuits.

Q. Do you remember Captain Larson coming in to order some additional supplies from you, and any conversation you had with him then about the "South Coast" being good for payment?

A. That is the time he came back from Mexico; he came in there and he asked me whether the "South Coast" was still good for a little paint, that he needed to paint the ship—if the "South Coast's" credit was good to paint the vessel.

Q. What did you say?

A. I said, yes, it was all right, I would let him have it.

Q. Was that conversation after the conversation that you had with Captain Roberts about the vessel being good for the bills? A. Yes.

Q. Do you remember when the repairs were being made on the vessel to enable her to pass the United States Inspection at San Pedro? A. Yes.

Q. Do you remember going out to the vessel yourself? A. Yes.

Q. While those repairs were being made?

A. Yes.

Q. Who was there representing the South Coast Steamship Company, do you know?

(Testimony of J. C. Rudbach.)

A. Captain Roberts.

Q. Did Captain Roberts at that time order any goods from you? [54] A. Yes.

Q. Are they part of the bills that have been rendered here?

A. Not in these bills, no; that was part of the bills that have been paid.

Q. That have already been paid? A. Yes.

Q. Captain, do you remember when you first came to San Francisco with these bills before and filed this libel? A. Yes.

Q. Do you remember whether or not upon that occasion you called upon Mr. Sooy and Captain Roberts and asked them to pay these bills?

A. I called on Mr. Sooy, and Captain Roberts, I believe, was out of town at the time.

Q. Refreshing your recollection by that, Captain, you testified upon cross-examination that you had never made a demand upon the South Coast Steamship Company. Are you still of that opinion?

A. I meant at the time that the bills were made out—I thought the attorney had reference to that.

Q. You did, however—

A. I did, however, before I gave you the case, go up to Mr. Sooy's office, in fact two or three times, regarding this matter, and he refused to pay; he told me "These bills that are O.K.'d by Captain Roberts, why, we will pay, but the other we will not have anything to do with."

Q. He said, "We will pay that"?

(Testimony of J. C. Rudbach.)

A. Yes; he meant the South Coast Steamship Company.

Q. Has any part of these bills been paid?

A. No.

Q. And the amount mentioned here is due you for these goods? A. Yes.

Recross-examination.

Mr. CERF.—Q. I understood you just a moment ago to say to Mr. Lillick that Mr. Mills told you that the ship was under charter, and that Levick & Oliver were the charterers, and that Captain Larson spoke about the ship not being liable—that is [55] what I understood you to say.

Mr. LILLICK.—He did not say the ship would not be liable.

Mr. CERF.—I just caught it as he said it. What did Captain Larson tell you in that regard?

A. After the ship was loaded ready for sea, he came in and ordered some stores.

Q. Captain Larson, I am talking about.

A. Yes, Captain Larson, that is who I mean; he came in and ordered the stores, and he says, "Now," he says, "Levick & Oliver will pay for this"; well, I said, "That is immaterial, whatever company pays for it, you understand this, that everything that goes on board that ship is charged up to the ship and owners, and I hold them responsible for it." "Well," he said, "in that case, don't send anything on board until I am satisfied that those things will be paid for," and I held those goods there in the store ready to put on the ship for six or seven days.

(Testimony of J. C. Rudbach.)

Q. You held them until Mr. Mills gave you assurance, that he had gotten—

A. Mr. Mills gave me assurance over the telephone—Captain Larson gave me assurance, he said, “I got a letter from Mr. Mills and he said he later got notice of the money, and he would take care of these bills.

Q. As a matter of fact, didn't Mr. Mills tell you that? Didn't you go to Mr. Mills' house with Captain Larson when Mr. Mills was ill and had his leg strapped up?

A. Yes, but he didn't tell me that at the house; he says he didn't have any assurance or have any funds to pay these bills, and he didn't guarantee anything at that time I was at his house.

Q. Was that the time that Larson told you to hold up the goods until they got word?

A. Yes, there were several days that I saw Mills and Larson, and he was down there trying to get the ship away, trying to get some funds.

Q. Until finally Larson told you that Mills had told him that [56] he had arranged about some notes?

A. Yes.

Q. Did he tell you that those notes were given for Levick? A. I don't know.

Q. Did he tell you that McDonald had given him a note?

A. I don't know who they were given by; the only thing I know is I called Mills up over the 'phone before he had the letter, and they were waiting, I believe, to get these stores on board, and I called him up there and asked him if everything was all right, and

(Testimony of J. C. Rudbach.)

he said all right, he had given a letter to Captain Larson; in fact, I believe Captain Larson was with me at the time; more for company's sake, we kept together there; I didn't have any interest in Levick & Oliver; the distinct understanding was that all of the goods I sold was to the ship and owners; it was only to accommodate Larson that I went with him, and he called up Mills over the 'phone, and Mr. Mills told him it was all right, and we went across the bay, and I believe somebody handed him a letter.

The COURT.—Q. Mr. Mills told you he had a letter from the owners that the ship was under charter and no credit should be given to the ship?

A. Not to charge anything to the ship.

Q. You then said that you would not furnish anything on those terms? A. Yes.

Q. You would not send anything aboard the ship unless the owners were responsible? A. Yes.

Q. Mr. Mills said, "If that is the case you had better take it up with Captain Roberts who will be here in a few days"?

A. Yes, he said he would see me in a few days.

Q. Captain Roberts came and ordered some goods?

A. Yes.

Q. Did you tell him that you had had this conversation with Mills and you wanted to know just where you stood in the matter? [57]

A. I don't remember asking him particularly that. I took it for granted that he was the owner there, and ordered the goods there, and it was all right there, that Mills had told him.

(Testimony of J. C. Rudbach.)

Q. You did not ask him then?

A. I did not. I have no recollection that I did ask him.

Q. You furnished the goods?

A. I furnished the goods thinking that Mills had told him. I had other things to take care of.

(A recess was here taken until two P. M.) [58]

AFTERNOON SESSION.

Mr. LILLICK.—The libelant will rest, your Honor.

Testimony of C. H. Sooy, for Claimant.

C. H. SOOY, called for claimant, sworn.

Mr CERF.—Q. Mr. Sooy, are you familiar with the seal of the South Coast Steamship Company?

A. I am, yes.

Q. Are you familiar with the signature of John Roberts? A. I am.

Q. The signature of Howard R. Levick, Jr.?

A. Yes.

Q. I hand you what purports to be a charter-party dated the 19th of June, 1915, made by the South Coast Steamship Company as owner, and Howard R. Levick, Jr., as charterer, and I call your attention particularly to the seal and signatures appearing on the last page, and ask you if that seal is the seal of the South Coast Steamship Company? A. It is.

Q. I ask you if that signature is the signature of John Roberts? A. It is.

Q. And the signature of Howard R. Levick, Jr., is that his signature? A. Yes.

(Testimony of C. H. Sooy.)

Mr. CERF.—We offer in evidence, if your Honor please, this charter, and ask that it be marked Claimant's Exhibit "A," and if I am permitted I will read one paragraph of the charter-party to your Honor, and I will call your Honor's attention to the fact that it is provided by the terms of the charter-party, and particularly the fifth paragraph thereof:

"It is understood that this charter is a charter of the bare vessel, and that said party of the second part shall furnish the crew, pay their wages, victual them, furnish all deck and engine room and saloon stores and supplies of every kind and [59] nature; pay for all fuel, fresh water, port charges, wharfages, customs charges, customs fines or Government fines, pilotages, overtime of crew; agencies, commissions, consular charges, drydocking, painting of the hull of said vessel, furnishing all lines and slings, and pay all other charges whatsoever, of every nature, whether of the same kind as hereinabove enumerated or otherwise that may be incurred in or about the use of said vessel during the term of this charter."

Mr. LILLICK.—Q. Do you offer that portion of it, or all of it?

Mr. CERF.—I offer it all; I read particularly that part to his Honor; there are other provisions of a similar character.

(The charter is marked Claimant's Exhibit "A.")

Q. Now, will you state, Mr. Sooy, whether or not the steamer "South Coast" referred to in this charter-party, was delivered to the charterer therein named? A. Yes.

(Testimony of C. H. Sooy.)

Q. At what time, with respect to the date of the charter-party?

A. On the day the charter-party was signed.

Q. Was the vessel ever returned to the owner?

A. Yes.

Q. When?

A. Sometime, I think, in November of that same year.

Q. 1915?

A. Yes; it might have been in October, I judge, but my recollection is it was November.

Q. Mr. Sooy, did you have occasion to go to San Pedro in the month of August, 1915, at the time the "South Coast" was lying there? A. I did.

Q. Did you on that occasion meet Captain Roberts? A. Yes.

Q. On that occasion, did you meet Mr. Rudbach, the libelant in this proceeding? A. Yes.

Q. Will you please state when and where you met Mr. Rudbach?

A. It was the day before the "South Coast" cleared for Ensenada; she cleared San Pedro harbor about two o'clock in the morning [60] of Friday, the 13th.

Q. Of August? A. Of August.

Q. 1915, last year?

A. 1915; I think it was on the 12th, either the 11th or the 12th, I am inclined to think it was the 12th that I met Mr. Rudbach.

Q. Where?

A. At Mr. Rudbach's store in San Pedro.

(Testimony of C. H. Sooy.)

Q. Who was present on that occasion?

A. Captain Roberts.

Q. Who else? A. Myself and Mr. Rudbach.

Q. Will you recount, please, the conversation that you had with Mr. Rudbach on that occasion?

A. In substance, I can; I cannot, of course, give the exact words of it, but I said to Mr. Rudbach, "You have furnished an order of goods here to the steamer 'South Coast.'" He said, "Yes, here they are"; they were laid out in a run-way, a sort of alley-way in his store there, as I recall it, between two streets, and I said, "Do you understand from Captain Roberts that the ship is not responsible for these bills?" He said, "Yes, but Captain Roberts tells me that he is going to pay me out of the money that he gets from Levick." I said, "Captain Roberts is the president of the South Coast Steamship Company, and I am the secretary and attorney of it, and Captain Roberts has just told me," and that was the way Captain Roberts introduced me to Mr. Rudbach, and I said, "I do not want any question at all about this bill or about any other bills that may be incurred on behalf of the 'South Coast,' and I have come here particularly to tell you that."

Q. Was anything further said?

A. Then Roberts said that Levick would be in San Pedro on that afternoon, with the understanding that he was to turn over the money to Roberts, and that Roberts would pay Mr. Rudbach.

Q. That was stated at that time, was it?

A. That was stated at that time. [61]

(Testimony of C. H. Sooy.)

Q. As a matter of fact, do you know whether Captain Roberts at that time occupied some position on the vessel?

A. He was the captain of the ship.

Q. Employed by whom? A. By Levick.

Q. For what purpose, for what voyage?

A. For the purpose of going to Ensenada and return.

Q. Just for the one voyage?

A. Just for the one voyage.

Q. Do you know, Mr. Sooy, whether or not the steamship "South Coast" was under charter from Levick & Oliver to the Western Pacific Steamship Company at that time to make this particular voyage to Ensenada and return?

Mr. LILLICK.—Objected to as irrelevant, immaterial and incompetent; we are not concerned with that; if we have anything to do with this, we have the charter-party.

The COURT.—Yes, is it not material.

Mr. CERF.—I think the objection is well taken, so far as the competency of the question is concerned, because the agreement is in writing.

The COURT.—I think it is well taken as far as materiality is concerned.

Mr. CERF.—This is the only point I wish to make, if your Honor, please: I want to show that Levick & Oliver, the charterers, had made a contract with the Western Pacific Steamship Company for this voyage, and that contract, itself, provided that Captain Roberts should be the master of the vessel for that partic-

(Testimony of C. H. Sooy.)

ular trip, in order to indicate that Captain Roberts' capacity at that time with respect to the "South Coast" was not as an owner, or not as an agent of the owner, but as master of the ship.

The COURT.—This contract would not establish that.

Mr. CERF.—Q. I will ask you this question, Mr. Sooy: [62] You say that you were the attorney and secretary of the South Coast Steamship Company? A. Yes.

Q. Were you a director at that time? A. Yes.

Q. Did the South Coast Steamship Company have any interest whatsoever in the voyage of the "South Coast" from San Pedro to Ensenada and return?

Mr. LILLICK.—Objected to on the ground it is incompetent; we are bound, if at all, by the acts of these officers of the company there, and whether they were *interest* in the voyage is no concern of ours; whether they were interested in the voyage they were making is another thing.

The COURT.—It is not except on the theory that the libelant is undertaking to hold them because of some interest they might have had in the voyage. I do not think that is the case at all.

Mr. CERF.—That is the precise reason of the question; I was apprehensive of the position that Mr. Lillick would take that Captain Roberts ordered these goods as an officer of the South Coast Steamship Company; the position we take is he ordered these goods as master of the ship, and in a capacity entirely different from that.

(Testimony of C. H. Sooy.)

The COURT.—I think the Court understands that.

Mr. CERF.—Has your Honor ruled upon the objection?

The COURT.—The objection will be sustained.

Mr. CERF.—Q. Mr. Sooy, at the time the "South Coast" left San Francisco after this charter had been made, did you have any conversation with the master of the ship, namely, Captain Larson, concerning the notification of all persons furnishing supplies and materials to the ship, that the ship was under charter, and that the materialmen and so forth must look to the charterers for their compensation? [63]

Mr. LILLICK.—Objected to upon the ground it is hearsay, not binding upon us, not in our presence.

The COURT.—That might be true, but it is of some interest to know whether he took the precaution to advise them. The objection will be overruled.

Mr. CERF.—Will you answer the question?

A. Yes; I did.

Q. Will you state what you said to Captain Larson?

A. When the ship left here in tow on Sunday, bound for San Pedro, where she was to be repaired, I called Captain Larson aside on the dock and told him that regardless of what happened, that I did not want any bills incurred for which the ship would be responsible, and that I wanted him to particularly notify anybody that he was acting for Levick, Oliver & Levick, as we always say—they were really co-partners, but Levick was the charterer, it was taken

(Testimony of C. H. Sooy.)

in his name—to notify everyone personally that the ship was not responsible for any bills. That was on Sunday. Then, afterwards, in August, I went to San Pedro, and when we got back from Ensenada I gave Captain Larson written instructions that the ship was not to clear the dock until all of the bills, whatever they were, were paid. I understood from Mr. Mills, that some bills had been incurred, and I, of course, knew that Mr. Rudbach had furnished this bill of \$290 odd, something of that kind, and I gave Captain Larson written instructions, as I remember it, wrote the letter out in longhand just before I left the ship, and before I came to San Francisco, and Captain Larson assured me that he would carry out my instructions in that regard, and I believe that he did.

Q. Mr. Sooy, was Mr. Mills ever the agent or the employee of the South Coast Steamship Company?

Mr. LILLICK.—Objected to upon the ground it is not the best evidence; if he was the agent, it would be in writing; the testimony of the witness to that effect would not be binding. [64]

The COURT.—It would be the best evidence if it was in writing; suppose no agency had been created?

Mr. LILLICK.—Is the agency in writing?

Mr. CERF.—There never was any agency.

A. No, he was not.

Q. Do you know whether or not Mr. Mills was acting respecting the “South Coast” at San Pedro?

A. Well, Mr. Mills, in order to make it perfectly clear, originally had to do with the chartering of the

(Testimony of C. H. Sooy.)

“South Coast” to Levick from the South Coast Steamship Company; he and Captain Roberts were acquainted, friends, and Mr. Mills had become interested in the chartering of the “South Coast” because the Santa Fe Railroad Company wanted to bring ties out of Mexico; and Mr. Mills, the purchasing agent of the Santa Fe Railroad Company, was a friend of his, and he mentioned the matter of the chartering of the “South Coast” to Levick and also to Roberts. Now, when we finally consummated the charter, it was understood, at least I understood that Mr. Mills was to act for Levick and Oliver in and about the repairs of the ship and taking care of her at San Pedro; just what the relationship between Mr. Mills and Mr. Levick or Levick & Oliver was, I don’t know, but I knew that he was going to act for them.

Q. Did you, soon after the vessel left San Francisco for San Pedro, write Mr. Mills a letter in connection with the accounts? A. I did, yes.

Q. I hand you a letter and ask you whether or not that is a copy from your files of the letter that you wrote to Mr. Mills on that occasion?

A. Yes, that is the letter.

Q. It was signed, of course, by you? A. Yes.

Mr. LILLICK.—Objected to upon the ground it is not binding upon us, if your Honor please.

The COURT.—Let me see it.

Mr. CERF.—It is offered for the same reason that the instructions [65] were offered.

The COURT.—It is already in evidence that this matter was conveyed to the libelant; the letter, itself, was not read to him, but he saw a letter taken from a pigeon-hole, and the fact of the charter and the conditions as to holding the ship responsible for any goods was made known to him. The objection will therefore be overruled.

(The letter is marked Claimant's Exhibit "B" and is as follows:)

Plaintiff's Exhibit "B"—Letter, June 26, 1915, Sooy to Mills.

"June 26, 1915.

"Mr. E. A. Mills.

Pacific Wharf & Warehouse Co.,
East San Pedro, Cal.,

Dear Sir:—

Under the provisions of charter and option given by the South Coast Steamship Co., the owner of the S. S. 'South Coast,' to Mr. Levick, the repairs now being made to this vessel are to be made for the credit of Mr. Levick and not upon the credit of the vessel. This is also true as to any supplies that may be furnished the vessel or on account of any labor furnished thereto. Carrying out the agreement with Mr. Levick *all* of the persons, firms or corporations furnishing supplies, labor or materials to said vessel are to be notified either by you or ourselves that they cannot hold the vessel for any supplies, labor or materials furnished the said vessel. Upon receipt of this letter you will therefore please notify

(Testimony of C. H. Sooy.)

all persons furnishing said supplies, labor or materials, to the vessel that they must look to Mr. Levick and not to the vessel for payment of same. Please notify me in answer to this that you have done as requested, and let me know the names of the people whom you have notified. I would rather, on account of relationships, have you notify these people than for us to write the letters, because if we wrote it it might in some way injure Mr. Levick, and this [66] I do not wish to do. I have just been informed by Mr. Levick and Mr. Oliver that he has arranged for insurance on the vessel after repairs are made. Thanking you in advance for this courtesy, I am,

Very truly yours,"

Mr. CERF.—Q. Mr. Sooy, Mr. Rudbach has stated that a few days before this libel was filed, he called at your office in connection with the payment of this account. Will you please recount what transpired at that time between you and Mr. Rudbach?

A. Well, I think Mr. Rudbach called two or three times, just which time it was I do not remember, but the substance of all the conversations was this, Mr. Rudbach made a demand upon me to pay this bill, and I said, "Why, Mr. Rudbach, you have no claim against this ship; you know as well as I do that I myself told you that the ship was not to be responsible." "Well," he said, "I want to get my money, and I have you, because I billed it 'South Coast and owners.'" I said, "It don't make any difference what your bill is, that doesn't control," and then I cited his Honor's ruling in the 'Ray' case, and one or

(Testimony of C. H. Sooy.)

two other cases, and he said he didn't believe that was the rule, that a ship was always responsible, regardless of who operated her, or anything of that kind, that the supplies went aboard the ship, and he wanted the money. I said, "Mr. Rudpach, Mr. Levick or Levick & Oliver have given up this ship, and they have left a whole lot of debts, and possibly a lot of people are—money is owing to a lot of people, that Levick & Oliver ought to pay; the only chance they have to get out at all is to sell the ship, and I have agreed with Levick & Oliver that if they can sell the ship even now, even after I had to put up the money to pay the crew, that I advanced personally, by the way, that if they could sell the ship out and get us the price that we had figured on in the [67] first place, which I think was \$17,500, they will get enough money out of it so that they can pay these debts, they can sell it, and I do not like to see you go to the expense of bringing litigation which in my opinion will result in your failing to get a judgment." "Well," he said, "I have you on that, because I have billed it 'South Coast and owners,' " and with that he went out of the office; he wanted his money right away, and I told him we would not pay the bill, but that if Levick & Oliver could find a purchaser for the ship, that then I would agree that we would take what we had originally agreed to, and not take any advantage on account of the \$10,000 or \$11,000 of repairs and tanks that they had put aboard the ship, we would take just what money was coming to us out of it, and they could take the bal-

(Testimony of C. H. Sooy.)

ance"; I think the price they paid for the ship—

Q. That is not material.

A. I do not think so.

Q. On that occasion, or any other occasion, did Mr. Rudbach ever deny that you had told him in his store in San Pedro that the ship was a chartered ship, and that he must look exclusively to the charterers for the payment of this bill?

A. Certainly not. Mr. Rudbach and I had a perfectly clear understanding on that on two occasions.

Cross-examination.

Mr. LILLICK.—Q. You are quite sure about that, are you?

A. There is no question in my mind about it.

Q. Realizing you gentlemen are absolutely opposite in your testimony as to that? A. Yes.

Q. You are an attorney, Mr. Sooy? A. Yes.

Q. Have been for a great many years? A. Yes.

Q. You knew when you were in Los Angeles that Mr. Rudbach had furnished those supplies that were lying upon the floor of his store?

A. They had not been furnished. [68]

Q. They were lying there, and you knew they had been ordered by Captain Roberts? A. Yes.

Q. You knew also if this question came up there would be some question about the liability of the vessel? A. No, I do not think so.

Q. Why did you tell him, then—you say that the vessel should not be held responsible?

A. I will tell you why I told him; all the other

(Testimony of C. H. Sooy.)

bills had been ordered by Mr. Mills, so I understood at that time, and when I arrived in San Pedro that morning Captain Roberts said that he had ordered the stores from Rudbach, and I immediately saw, not knowing then that Mr. Rudbach, had been notified by Mr. Mills or anybody else, I immediately saw that since Roberts was the president of the South Coast Steamship Company, and also the captain of the "South Coast" for that voyage, that the ship might be held liable, since the captain, under that statute, was presumed to have authority to bind the ship, and I asked Roberts whether he had made that clear to Rudbach, and he said, "Oh, he understands it." I said, "Does he understand it clearly?" So we went from the "South Coast" across the sand spit and across the ferry and clear up to Rudbach's store for the express purpose of telling Mr. Rudbach just what I have told you, and I explained to him that she was a chartered vessel, and that under the terms of the charter-party would not be responsible for the bills; that was my purpose in going there. I do not want to make an argument upon it.

Q. Feeling the responsibility of the vessel in that respect, Mr. Sooy, why didn't you serve a written notice?

A. I don't know that the serving of a written notice occurred to me at all.

Q. Did you know the rule laid down in the "Milford" case is, where the owners stood by and saw material and supplies furnished to a vessel, that they

(Testimony of C. H. Sooy.)

are responsible, because the inference is that [69] they authorize them?

A. If they stand by and make no objection that probably would be true.

Q. You understand that is the rule in that case?

A. I do not recall the facts of that case now; I don't know that I recall the rule.

Q. Why did Captain Roberts O. K. these bills, do you know?

A. Roberts O.K.'d the bills as master of the ship.

Q. And also as president of the South Coast Steamship Company, did he not?

A. I don't know whether he did or not as president, I am sure.

Q. Captain Roberts was the president of the steamship company at that time?

A. He was, and I was the secretary.

Q. Did you not know, as a matter of fact, Mr. Sooy, that Captain Roberts subsequently, not once but many times, said that the vessel was responsible for these goods?

A. Well, of course, Mr. Lillick, what legal determination of the liens against the "South Coast" might have been arrived at by Captain Roberts, I don't know, but I just say that if Captain Roberts decided in his wisdom that there was a lien created, that it would have carried weight in my mind in determining that legal proposition.

Q. That is not an answer to my question: Didn't you know, Mr. Sooy, that as a matter of fact Captain Roberts, not only once, but repeatedly, told Rud-

(Testimony of C. H. Sooy.)

bach that the vessel was responsible for the bills?

A. No, I do not. And I would be greatly surprised to learn that he did say any such thing, because I had instructed Captain Roberts before he left for Los Angeles to call upon Mr. Mills immediately upon his arrival there and get a list of the bills, and to notify everyone that that ship was not responsible for those bills.

Q. Mr. Sooy, you had had, as the attorney for the North Pacific [70] Coast Steamship Company, a similar experience at one time with a steamer known as the "Eureka," did you not?

A. Four times, I think.

Q. And in your wisdom then, as an attorney, you published a notice, did you not, in a newspaper? Why did you not do it in this case?

A. For the simple reason, when we offered testimony of the publication of that—no, when you offered in the Ray case to introduce the "Guide" and some other newspaper publications, it was ruled out by the Court.

Q. And that was why you did not publish a notice in the newspapers in San Pedro?

A. I might say, however, that without any knowledge upon my part, the newspapers were full of the "South Coast's" sailing and all of that sort of thing, together with more or less complete detailed statements of what she was going to do and where she was going.

Q. And that her owner or owners, Captain Roberts

(Testimony of C. H. Sooy.)

and Mr. Sooy were going with her to Ensenada, did they not?

A. No, they did not mention our names.

Q. Are you sure about that?

A. Not any accounts that I saw.

Q. Mr. Sooy, do you recall having said upon one occasion that even if the South Coast Steamship Company and the steamer should be held responsible for these bills, that the steamer and the company would be ahead anyway by reason of the repairs that were made upon her at San Pedro?

A. Well, I don't remember making the statement, Mr. Lillick.

Q. It is a fact, is it not, that the repairs that were made upon her totaled, with the tanks that were put upon her, something like \$10,000?

A. I think about \$11,000.

Q. Did you know at that time, and upon the 13th of August, 1915—is that right—Friday, the 13th of August, 1915?

A. Yes, that is the day, in the dark of the moon.
[71]

Q. Did you know that the vessel had against her a number of claims for supplies that had been furnished? A. On the 13th of August?

Q. 1915, when she cleared for Ensenada.

A. No, I do not believe that the vessel had any claims against her then, other than the claims which your office represented, and which Mr. Frank's office represented. You mean under the Levick & Oliver regime; is that what you mean?

(Testimony of C. H. Sooy.)

Q. So far as I know, we are only concerned with the question of her supplies during the time between August and October.

A. But you are asking me whether there are any claims against the vessel.

Q. At that time for supplies furnished to her, and during the time that the charterers were putting on these repairs, which amounted to \$11,000, you say?

A. I do not think there were any claims against the vessel at all at that time.

Q. Then, the charterers had paid you promptly, had they, for the charter hire due?

A. No. You are talking about one thing, and I am talking about another. I understand your question to be whether or not there were any claims against the vessel.

Q. In August, of 1915, on Friday, the 13th, when she cleared for Ensenada.

A. That is, you mean claims by persons who might have furnished supplies to her?

Q. Yes, Mr. Sooy.

A. No, there were no claims against the vessel at that time.

Q. Not even of Captain Rudbach?

A. I consider that Captain Rudbach did not have any claim against the vessel.

Q. And at that time you made no remark to anyone that you remember that the South Coast Steamship Company has \$11,000 on account of charter hire or repairs that these gentlemen have made [72] upon her, and we are not going to lose anyway?

(Testimony of C. H. Sooy.)

A. I don't remember of making any such remark as that; if you will particularize or get down to telling me who I made it to, probably I did, but I have not any distinct recollection of making any such remark as that now.

Q. On Friday, the 13th of August, 1915, were the charterers of the steamer "South Coast" in arrears in their charter hire?

A. I am inclined to think they were.

Q. How long had she been under charter to them?

A. Since the 26th of June.

Q. And the charter hire specified in the charter is \$1250, as I remember it, for the first month?

A. I don't remember what it is.

Q. And \$500 a month after the first two months, is it not?

A. The charter speaks for itself; I cannot remember off-hand.

Q. Just prior to August 13, 1915, the vessel had been at San Pedro, had she not?

A. Yes, she went from here down there.

Q. She was towed down by one of the McCormick steamers? A. Yes.

Q. When she arrived there, the charterers placed upon her \$11,000 in betterments, did they not?

A. No, they did not; they put on tanks on her deck, which were, of course, no use to the vessel in the lumber trade, that she had been engaged in prior to that time.

Q. But \$11,000 had been expended by the charterers upon the vessel, had it not?

(Testimony of C. H. Sooy.)

A. I do not think that is true, in betterments.

Q. Call it betterments, or tanks, or what you please, the charterers of the steamer "South Coast," up to Friday, the 13th of August, 1915, expended \$11,000 on that vessel, did they not?

A. No, I don't think they had expended that much.

Q. How much had they expended? [73]

Mr. CERF.—If you Honor please, I have not made any objection to the entire line of testimony, but I cannot see that it will assist your Honor in any way to any determination of this matter; I think it is entirely immaterial.

The COURT.—I will take the testimony; the objection is overruled.

A. I cannot tell you, Mr. Lillick, I don't know. I know there was—when I got back from Ensenada, I went over the matter with Mr. Mills, and it strikes me there was about \$3000 owing then.

Mr. LILLICK.—Q. What did you testify a few minutes ago about that \$11,000?

A. Well, I testified that the total amount that they had spent in and about the operation of the vessel, and all that sort of thing, was about \$11,000; the major portion of that, I think, was in repairs and supplies furnished to the vessel, but I have no accurate knowledge of it, except what I have been told.

Q. Why did you go to Mr. Mills about that?

A. For the reason that I did not want anyone else to have any indebtedness or to furnish any supplies to the vessel until Levick had financed himself.

Q. During the absence of Captain Roberts in San

(Testimony of C. H. Sooy.)

Diego, to whom did you look to there for the interests of the South Coast Steamship Company?

A. Captain Larson.

Q. To no one else? A. To no one else.

Q. Why should you write to Mr. Mills as you did

A. Because as I understood it Mr. Mills was to have direct charge of the repairs, and checking out the money for Levick in the repairs of the vessel.

Q. And you had no other connection with Mills than that? A. No. [74]

Q. And you looked solely to Captain Larson, did you?

A. I looked solely to Captain Larson. I do not say that Mr. Mills was not very friendly to us, and that he would probably have accommodated us in anything we wanted done, but there was no business relationship between us as I remember.

Testimony of E. A. Mills, for Claimant.

E. A. MILLS, called for claimant, sworn.

Mr. CERF.—Q. What is your full name, Mr. Mills? A. Eugene Allen Mills.

Q. Where do you reside? A. San Pedro.

Q. What is your occupation?

A. I am superintendent of the Pacific Warehouse & Storage Company.

Q. You know Mr. Rudbach, of course?

A. Yes, quite well.

Q. You know Captain Roberts, don't you?

A. Yes.

(Testimony of E. A. Mills.)

Q. Mr. Sooy? A. I do.

Q. The Steamship "South Coast"? A. Yes.

Q. Mr. Mills, do you remember the occasion that the "South Coast" arrived at San Pedro after she had been chartered to Levick, in tow—do you remember when she arrived there in tow? A. I do.

Q. When did you first have any conversation with Rudback thereafter concerning the furnishing of supplies to the "South Coast"?

A. I think it was either the day she arrived, or the day after.

Q. Was that before or after you had seen Captain Roberts? A. It was after.

Q. I will ask you first about the interview you had with Captain Roberts, the first interview you had with Captain Roberts after the "South Coast" arrived at San Pedro in tow; just tell us what it was that Captain Roberts told you?

A. Well, he confirmed the terms of what you call the charter-party, which I [75] consider was more in the nature of a sale, a contract for sale, in which we discussed for some little time previous that we were going to sell this boat to Levick & Oliver, on terms, on a contract, and they were to stand the expense of the repairs; in other words, Captain Roberts told me they had no money to repair her with; in fact, when I brought up the question of a sale, he even mentioned one or two other boats that he thought they had better sell, because they could not put this boat in conditon for service. So, when

(Testimony of E. A. Mills.)

he finally consummated the deal, the charter, sale, or whatever you want to call it of the boat, if I remember right, I was in San Pedro about Wednesday, and either the day following or the day following that Captain Roberts came down as pilot on one of the Luckenbach boats; they dock at our wharf, and he came up to the office immediately and he told me they had closed this deal, which I knew, which I had already heard from Levick, that the deal had been closed, and he said that the boat wanted to be put in repairs immediately, but that the purchasers were going to be responsible for the obligations of the vessel from that time on; the day before, or else that very same day, I am inclined to think it was that same day, in talking with Captain Rudbach on the 'phone, he happened to be the first one that I had talked to in regard to supplies, I told the captain that we wanted a few supplies for the ship, but that I did not know *why* was going to pay the bills, but that I would be personally responsible for that one order, that one particular order I would be responsible for personally.

Q. How much did that order amount to, if you remember?

A. I do not suppose it amounted to over \$5 or \$10, enough to keep five or six caulkers busy; that is what they were doing, caulking the ship; I don't believe it would be over \$10; it [76] might have been; at any rate, not much over that. At any rate, the following day Mr. Levick arrived on the scene, and he made his arrangements with me, and with Captain

(Testimony of E. A. Mills.)

Larson for the payment of the bills; as I understand it, the arrangement was that Captain Larson was to be given cash to take care of the crew; they had a little crew; any indebtedness that I wanted to pay for was to be covered by a draft by me on his bank in San Francisco, which is customary in our dealings with any ship owner; so, along those lines, I immediately told Captain Larson he could go ahead and the chances are, I told Captain Rudbach he could go ahead and furnish these supplies, that I was satisfied that proper arrangements had been made. Captain Roberts told me as soon as he got there that we would have to look to Levick & Oliver for the money, and that is the reason I would only guarantee this first bill, and I waited until I saw Mr. Levick before I authorized any further orders.

Q. In other words, you would not authorize any further expenditure until Levick had financed the bills?

A. I did not dare. We act in these matters, it is more of an accommodation service, it is a service for which we do not receive any reward; it is the same way as Captain Rudbach does, I guess, in furnishing supplies to a ship, if a man wants some little fresh vegetables or meat, something that he does not carry, he will go and get it for them, and we do those same things for our customers, but I did not dare obligate either myself or the company on a proposition that I was entirely in the dark on. [77]

Q. And you remained in the dark until Levick arrived, did you?

(Testimony of E. A. Mills.)

A. As I say I do not recall whether he arrived that day or the following day. I think I could find that out by reference to the data that I have.

Q. Then what transpired between you and Levick?

A. We talked the matter over and made this arrangement and went to lunch, and at lunch time we met Captain Rudbach; I introduced him to Captain Rudbach and I am almost positive I introduced him as the new owner of the "South Coast"; the fact that he was really a charterer did not appeal to me because I thought that I had been instrumental in making a sale, not a charter, and I introduced him as the new owner.

Q. Now, there were supplies that were furnished and work that was done on the ship, the "South Coast"? A. Yes.

Q. What capacity did you occupy in those operations, what position?

A. More in the nature of a disbursing agent; I don't know as you would call it a disbursing agent, because I really had no connection whatever with either the former owners or the new owners, except that in our dealings down there we handle a great many financial transactions of any note whatever; in other words, a vessel may be loading cargo at our wharf and we will advance the railroad freight charges for the charterers or for the vessel's owner, with the expectation that when the vessel clears she will settle up all of her indebtedness with us; these matters may run along indefinitely. In this instance I was not sure of the financial responsibility of Mr.

(Testimony of E. A. Mills.)

Levick and made him make an arrangement with me whereby I could draw on him at San Francisco; after that arrangement was made then I did not hesitate to go ahead and authorize the repairs to go *head*.

Q. After these arrangements were made what relationship existed between you and Levick? [78]

Mr. LILLICK.—We have no objection to the witness stating the facts, but his conclusion as to this relationship we object to. Just tell what you did and what Levick did?

A. I paid bills for Levick & Oliver and drew drafts against their San Francisco account to cover it.

Mr. CERF.—Q. How about ordering goods, ordering supplies and materials and that sort of thing?

A. I don't know but one or two items that I ordered after that first order I gave Captain Rudbach; in fact in San Pedro, the only thing that I remember we ordered something up in Los Angeles, a valve, or something from Crane & Company over the telephone, and I ordered that for the boat; outside of that there might have been one or two other items that I did, but I don't recall if there were; I am pretty positive about that.

Q. Now, do you remember having received a letter from Mr. Sooy concerning the payment of bills?

A. Yes, that was several days after the boat had arrived.

Q. Several days after?

A. That was after Captain Roberts had told me the same thing.

Q. Captain Roberts told you the same thing?

(Testimony of E. A. Mills.)

A. I also received the same information from Mr. Levick that Levick & Oliver were to be responsible for the bills.

Q. After you received this letter from Mr. Sooy, did you call again Captain Rudbach's attention to the fact that he must look for his compensation to Levick & Oliver?

A. Yes. Not with particular reference to that letter, but you must understand that these dealings ran over a period of 3 or 4 months, and during that 3 or 4 months I probably had 15 or 20 conversations with Captain Rudbach, in every instance of which I made it plain to him I had to get my money from Levick & Oliver before I could spend any money. I do not mean to say that upon receipt [79] of that letter that I immediately went and told him the circumstance, because I had already told him that until Levick had satisfied me in regard to the money end of it I could not order any more goods, but I did on numerous occasions tell him that I was getting this money from Levick & Oliver.

Q. What did you do after the vessel was delivered at San Pedro; did you do anything in regard to her for the South Coast Steamship Company; that is to say, the people who are referred to as Sooy & Roberts?

A. I never knew there was such a concern as the South Coast Steamship Company until sometime after she arrived there; my understanding was that Captain Roberts and Mr. Sooy owned the vessel jointly; the South Coast Steamship Company as a

(Testimony of E. A. Mills.)

corporation so far as I was concerned did not exist until sometime afterwards; it was Captain Roberts and Mr. Sooy as partners.

Q. After Levick appeared upon the scene of action did you act at all for Captain Roberts and Mr. Sooy in connection with the "South Coast"?

A. No, I did not. You mean in any capacity whatever?

Q. In connection with the "South Coast"?

A. No, I did not.

Q. Now, when the ship returned from Ensenada did Mr. Sooy have any conversation with you concerning his desire that the ship should be tied up at the dock until everybody was paid?

A. Well, I do not recall the exact conversation. I do remember that when the ship returned from Ensenada or possibly before—no, it must have been after—it must have been after the boat returned from Ensenada, either the day after or—I would not want to say whether it was just before or just after, but it was while Mr. Sooy was there in connection with the Ensenada trip, he came in the office and asked me how many bills there were outstanding against the ship that Levick & Oliver had contracted [80] for, and at that time I told him there were in the neighborhood of about \$3,000 worth of purchases; I am not sure but what there was a little over \$3,000; it might have been a little under.

Q. Who asked you that? A. Mr. Sooy.

Q. Now, you had several conversations I believe you have testified to here with Captain Rudbach con-

(Testimony of E. A. Mills.)

cerning payment of his bills? A. Oh, yes.

Q. On any one of these occasions was the name of a person who was to pay him mentioned?

A. In every instance.

Q. Who was that person? A. Mr. Levick.

Q. Was the name of Roberts or Sooy ever mentioned between you and Captain Rudbach in connection with the payment of these bills?

A. Well, not by me of course in the sense that they were to pay the bills—the names of both Captain Roberts and Mr. Sooy were mentioned quite frequently in connection with the affairs of the vessel.

Q. But I am talking about the payment of the accounts?

A. Not in regard to the payment of the bills.

Q. The person who was always talked of as being the one who was to furnish the money to pay the bills was Levick?

A. Absolutely, so far as I was concerned, he was the only one.

Q. I am talking about the conversation you had with Mr. Rudbach?

A. That is what I am talking about.

Cross-examination.

Mr. LILLICK.—Q. You did not tell Mr. Rudbach that Levick had chartered the boat, did you?

A. I thought he bought it; I should have known better though.

Q. Isn't it true, Mr. Mills, that Mr. Rudbach repeatedly told you that he didn't care whether Levick

(Testimony of E. A. Mills.)

paid for them or who paid for them, he was looking to the ship and her owners for payment? [81]

A. That was some little time, naturally, it would be some little time after the first indebtedness had been incurred, but his contention from that standpoint did not appeal to me at the time because so far as I thought Levick & Oliver were the owners; in other words, to bill them against the "South Coast" and owners would mean the "South Coast" and Levick & Oliver, not the "South Coast" and Roberts & Sooy.

Q. Is there any question in your mind but that Captain Rudbach in good faith sold these goods to the vessel and her owners? A. No, there is not.

Q. He sold them to whoever ordered them, with the honest intention of holding the vessel and her owners for it, did he not?

A. I think that was his intention.

Q. And he told you that too during the time it repeatedly came up, and he said, "Well, I am looking to the vessel and her owners for the payment of these goods"? A. Yes, he did.

Q. And he thought at that time that Levick was the owner—he had no reason to disbelieve that?

A. He had no reason to disbelieve Levick was the owner, because I had told him he was.

Q. He thought as a matter of fact that he was selling to the vessel and her owners?

A. Absolutely.

Redirect Examination.

Mr. CERF.—Q. Of course irrespective of what

(Testimony of E. A. Mills.)

Mr. Rudbach thought, Captain Roberts told you that the vessel was not to be responsible for it, but that Levick was, and when you got Mr. Sooy's letter in which he stated the vessel was not to be responsible, but that Levick the charterer was, you told that to Mr. Rudbach, did you not?

A. Oh, yes; I told him direct he would have to get this money from Levick repeatedly.

Q. And that was before any of these goods were ordered from [82] Captain Rudbach?

A. No, it was after.

Q. I mean it was before any of the goods involved in this case were ordered.

A. The first order as I say of five or \$10. I guaranteed personally. After Mr. Levick had shown me that I could recollect immediately without any delay by drawing a draft on him in San Francisco I then told Captain Rudbach that Mr. Levick had made satisfactory arrangements with me and he could go ahead and furnish supplies for the ship; the supplies following that furnished by the San Pedro firm I did not order because we had Captain Larson and we had a chief engineer on the ship, and we also had a ship carpenter who was put there to supervise the gang of carpenters, and we gave these boys permission to go ahead and order their stuff; after the first order, I don't think unless it was because they wanted me to do the telephoning or something of that kind, I don't think I ordered a thing; in fact, I am not in San Pedro more than about half of the time.

Q. This question I asked you, whether or not you

(Testimony of E. A. Mills.)

did not tell Captain Rudbach about Roberts' conversation with you and Sooy's letter to you, whether you did not tell him those things before he delivered any of these goods which were bought, beginning in August?

A. Well, I would not say, but the account certainly must have been very small because I got Mr. Sooy's letter just a very few days after Captain Roberts had told me the situation, and it is my recollection that I had that letter in front of me one day when Captain Rudbach came in my office, and I read over that letter and told him what the situation was, explained it to him.

Mr. LILLICK.—And he said, "Well, I am looking to the vessel and her owners in that case, too"?

A. I don't think he did at that time; I don't think really he did then; I think it came up later when we all began to work about the money; at that time I don't think there was any question about it, but later when we all [83] began to work about the money, then it began to be a question of libel suits and one thing and another, and with me it was not a question of libel suits; I could not very well resort to that; I had a letter from both former owners and new owners telling me who was responsible, and in view of such written evidence of that kind I was, you might say, up a tree, but I really think it was quite a little bit later after we began to worry about the bills, about the actual libelling of the ship and placing liens against the ship occurred, because there was really no occasion in the early days; the thing

(Testimony of E. A. Mills.)

ran along for quite a little while; all I had to do was to draw a draft, every time I paid the bills; later the drafts were stopped and they made other arrangements with a bank in Los Angeles, and then about the time the vessel was really ready for sea they really got into their money difficulty, so it was more likely at that time that any question of libelling the ship would have come up.

Q. In the meantime that would also apply to Captain Roberts and Mr. Sooy down there—they were down there as the owners of the vessel, were they not in August, 1915?

A. No, I would not say that they were.

Q. Do you remember when they started for Ensenada?

A. I remember about the time; I was in Los Angeles the day they started.

Q. But they were there and so far as you knew they had an interest in the vessel; you thought they were owners of the vessel, didn't you?

A. No, I knew they were former owners of the vessel; I knew Captain Roberts was going to be captain on the trip.

Q. You also knew that Captain Roberts was the man who ordered these goods from Captain Rudbach, did you?

A. Yes, as captain of the ship; in fact he told me he would [84] pay for the bunch of supplies, that particular lot of supplies; he said that Levick had given him \$1,100, I believe, to pay for the expenses

(Testimony of E. A. Mills.)

of that trip, and he was to pay for those supplies; he didn't do it; and the next day or a few days afterwards I met Captain Rudbach and the Captain asked me if I had that money, if Roberts had left it with me, and I told him no, and I presume I used the expression that he used this morning, not that I meant anything disrespectful.

The COURT.—Q. But because it was true?

A. I won't deny it, even if the gentleman is present; I do not think that we will lose our friendship through that.

Testimony of John Roberts, for Claimant.

JOHN ROBERTS, called for the claimant, sworn.

Mr. CERF.—Q. Captain Roberts, were you at Ensenada during the months of June and July, 1915?

A. Yes.

Q. What were you doing there?

A. I was a pilot for the Luckenbach Steamship Company.

Q. You were a pilot for the Luckenbach Steamship Company? On any of the occasions of your visits to San Pedro during the months of June and July, 1915, did you ever order any goods from anybody for the South Coast Steamship Company?

A. June and July?

A. June and July, 1915? A. Yes.

Q. In the month of August, 1915, did you go to San Pedro in connection with the South Coast Steamship Company?

A. Yes; I arrived there the day before she got in with a tow.

(Testimony of John Roberts.)

Q. Just listen to the questions that I ask you, Captain, and we will get along much faster. In the month of August, 1915, did you go to San Pedro in connection with the steamship "South Coast"?

A. No.

Q. Were you at San Pedro in connection with the business? [85] A. Yes.

Q. In what capacity?

A. Pilot for the Luckenbach Steamship Company.

Q. In what capacity in connection with the "South Coast" in August, 1915?

A. President of the company, but I had nothing to do with it.

Q. Now, Captain, just listen to the question; I am not asking you about June or July; I am talking about August. In August, 1915, the steamship "South Coast" left for Ensenada, didn't it?

A. Yes, on August 13; that is right.

Q. Did you have anything to do with that voyage?

A. Yes.

Q. What did you have to do with it?

A. Mr. Levick ordered me as master to take charge of her for one voyage.

Q. A voyage from San Pedro to Ensenada and return? A. Yes.

Q. Did you act as master for the voyage?

A. Yes.

Q. Did you on that occasion order some goods from Captain Rudbach?

A. Yes, I ordered some stores, some groceries only.

(Testimony of John Roberts.)

Q. Are those the goods which are referred to in a bill or an account which has been presented here and which bears your signature, John Roberts—I am now handing you “Libelant’s Exhibit 1.”

A. I want to see the whole bill; yes, that is right. That is the one I O. K.’d.

Q. Did you ever order from Captain Rudbach any goods of any kind or description except those which are referred to in these bills which you have approved, namely, “Libelant’s Exhibit 1”?

A. No.

Q. You never did? A. I never did.

Q. When you ordered these goods from Captain Rudbach will you tell us, please, what conversation took place?

A. Well, I first took a store bill, a bill that was made out by the steward aboard the ship, and gave it to Mr. Rudbach and told [86] him to fill it out and told him it was for Levick & Oliver for the “South Coast,” and that I was going as master to Ensenada and back, and that if I had money enough I would pay him; that I had so much money from Levick & Oliver, and that I would pay him; I would try to pay him, it followed I did not have enough to pay him; I had to take enough money to Ensenada, which is a foreign port, and he got mad with me that night, and I don’t know exactly what conversation there was between us, some little conversation, and I did not pay him, and when I came back from Ensenada he wanted to know why I didn’t pay him, and

(Testimony of John Roberts.)

I said I didn't have enough money and that Levick & Oliver were going to pay him.

Q. Do you remember going over to Rudbach's store with Mr. Sooy? A. Yes.

Q. That was a day or so before the vessel sailed from San Pedro?

A. That was on the 12th, in the afternoon; on the 12th, I think it was, the 12th or 13th; I am not sure; it might have been the day that we sailed; we sailed early in the morning, one o'clock in the morning; we were not ready until midnight.

Q. You remember the occasion when you went over to the store? A. Yes.

Q. Do you remember the conversation which took place at that time?

A. Yes. I said "This is my partner."

Q. I asked you if you remembered it? A. Yes.

Q. Now, just tell us what it was.

A. I said, "This is my partner and I want you to talk to him about this ship," that the stores was on Levick & Oliver. Then Mr. Sooy started in to talk to him; I heard the conversation,—that the ship would not be responsible in any way, that she was a chartered ship, and also to be sold to Levick & Oliver; Mr. Sooy explained to him, to Captain Rudbach, the whole thing.

Q. Was there any other thing done at that time that you and Mr. [87] Sooy went over to Rudbach's store for? Did you go for any other purpose? Did you order any other goods?

A. I may have ordered a few little things, some

(Testimony of John Roberts.)

few little trifling things that were forgotten; I don't know how much, maybe a few dollars.

Q. You don't remember whether you did, or not?

A. No, I suppose I did.

Q. I asked you if you remember.

A. I think I do; I think I did.

Q. I don't want your supposition.

A. It did not amount to very much, however.

Q. Did you on any occasion after the libel was filed in this suit tell Captain Rudbach that the ship, the "South Coast," was liable for all of those bills and that he would be paid and that Mr. Sooy as a lawyer was interested in promoting litigation concerning this ship?

A. I was not here when the ship was libeled.

Q. I am asking you whether or not you ever had any such conversation.

A. With Mr. Rudbach?

Q. Yes. A. No, indeed I did not.

Q. Did you ever on any occasion tell Rudbach that the ship the "South Coast" was responsible for these bills? A. I never did.

Q. As pilot of the Luckenbach Company, you have occasion to go to San Pedro about twice a month, have you not?

A. Yes, sometimes four times, according to the ships that arrive.

Q. Between August and the end of the year you went to San Pedro very frequently, didn't you?

A. Yes; I have a memorandum book, I always keep a diary, but I have not it here.

(Testimony of John Roberts.)

Q. I am asking you if you went there very frequently. A. Yes.

Q. On any one of those occasions did Mr. Rudbach ever present you with a bill for any of the goods which he had sold that went aboard the "South Coast"? A. No. [88]

Q. Did he on any one of these occasions ever ask you when the bill was going to be paid?

A. No, only this bill.

Q. Did he ever ask you to pay any of these bills?

A. Only this bill.

Q. Did he on any occasion ask you to pay that bill except the time you came back from Ensenada?

A. No bills whatever.

Q. After you came back from Ensenada and came up to San Francisco and started to act again as pilot for the Luckenbach Company did Captain Rudbach ever ask you to pay any bill, even this one that you O. K.'d?

A. He spoke to me, said he was not getting his money, and I said, "You had better get after Lillick."

Q. Did he ever ask you to pay it? A. No.

Q. Did he ever present you with any one of these bills approved by Larson or Johnson or any of the other masters? A. No, I never saw them.

Q. But when you were down at San Pedro twice or three times a month did you always see Captain Rudbach? A. Always.

Cross-examination.

Mr. LILLICK.—Q. Are you quite sure about that,

(Testimony of John Roberts.)

that Mr. Rudbach never asked for payment of any of these bills? A. Excepting this one.

Q. He asked you to pay that one? A. Yes.

Q. Never asked you about any of the others?

A. No.

Q. Never had any conversation with you about it at all?

A. No—yes, he asked me who was going to pay them, and I said, “You had better look to Sooy and Mr. Mills.”

Q. So he did have several conversations with you?

A. Two or three times he wanted to know who was going to pay them.

Q. You said that Mr. Sooy and Mr. Mills?

A. I didn’t know anything about the other bills, I didn’t know [89] how much—how much the vessel had charged up to her, I could not say.

Q. You remember coming to my office about this, don’t you, Captain Roberts? A. Yes.

Q. About this case? A. Yes.

Q. You were the president of the South Coast Steamship Company during all this time, were you not? A. Yes.

Q. Captain, those supplies that are named in these bills were all supplies that were used on the “South Coast,” weren’t they, on the steamer “South Coast”?

A. I don’t know, except only this one bill.

Q. You know about that, don’t you?

A. About this one bill.

(Testimony of John Roberts.)

Q. They were the ordinary supplies taken by the vessel on her voyage; they were for the crew and captain, and they were part of the supplies that were on the ship when Mr. Sooy was down there and you asked Mr. Rudbach to have a little bite of supper with you?

A. No, you are mistaken about that.

Q. Tell me about that.

A. I didn't see any other bills but this bill. He said that he had other bills against her, but I didn't know anything about them. I know there had been some from time to time, but I didn't know how much, what the amount was; I didn't know who was going to pay them.

Q. You remember the time that he came down there when Mr. Sooy was eating in the cabin, and you asked him to come down and have some supper? A. Yes; I did not go down.

Q. But he went on down?

A. He went on down.

Q. He asked you, then, for the money for this bill, didn't he? A. Yes.

Q. And you said, "Well, that is all right, you see Mills, he will pay you; I left the money up there with Mills"? A. No, I don't think I did. [90]

Q. What did you tell him?

A. I told him that I would try and pay him the amount of this bill, which I always did want to pay Mr. Rudbach.

Q. He is entitled to the money, isn't he?

A. This bill he is not.

(Testimony of John Roberts.)

Q. Don't you think he is entitled to it?

A. No, he is not entitled to it, not by me, because I have no money. Mr. Levick took this money for this voyage and spent the money; I don't know how he spent it but he gave me \$1,000 for to take along and pay these bills and pay the crew, which I spent the money to pay the crew off and pay for other bills and did not pay this bill.

Q. You went on down to Ensenada? A. Yes.

Q. Mr. Sooy went with you? A. Yes.

Q. And you came back here? A. Yes.

Q. San Pedro is just as much a foreign port to the "South Coast" as Mazatlan, is it not? A. No.

Q. Why not?

A. Because she has been running there for the last 20 years.

Q. She is registered here, is she not? A. Yes.

Q. You know that a vessel whenever she is in any port except the home port is in a foreign port?

A. I can get credit in San Pedro, but I could not get credit in Ensenada.

Q. You say you could get credit in San Pedro?

A. Yes. I don't know as I could get credit on the "South Coast."

Q. I do not mean your personal credit, but for supplies to a vessel.

A. As a general thing they do give credit, they know the owners.

Q. Now, Captain, is there any question in your mind that Rudbach thought he was delivering these goods to the steamer "South Coast" and they were

(Testimony of John Roberts.)

being sold to the owner of that vessel? [91]

A. No; to Mr. Levick & Oliver all the time. I would like to state to the Court.

Mr. CERF.—Never mind.

Mr. LILLICK.—We will be very glad to hear it.

A. I would like to state to the Court this, that when the ship was under charter to Levick & Oliver, I told Captain Larson and the engineer that the ship was chartered to Levick & Oliver and that no bills should go against the steamer whatever, in any way, shape or form, and if they should at any time, to notify me or Mr. Sooy.

Q. You knew during all of this time that a man like Rudbach and the Hipple Machine Works and the other people down there were looking to the vessel for their payment? A. No.

Q. Don't you know that they were looking to the vessel for payment?

A. No; I hold up my hand to God, they never did; they looked to Levick & Oliver; they all the time looked to those men, as Mr. Mills also knew; because a vessel is lying there for a year, and the vessel had no money—I owned the "South Coast" and Mr. Sooy was trusting simply to me, and the vessel had been abandoned on two or three different occasions, and she was left in a big debt, and that is the reason I took hold of this vessel, this little steamer, and everybody in San Pedro knew that this vessel was chartered to go to Mexico, and she was chartered by Levick & Oliver with the privilege of buying her; they never paid us the \$3,000 for the advance money

(Testimony of John Roberts.)

that they were to pay; they never paid me one cent.

Q. Captain, how much did they put on her,—tanks? A. They put tanks for their own use.

Q. In money is what I mean.

A. In the neighborhood of about \$8,000.

Q. Was it not ten or \$11,000?

A. No; the crew and everything, after they threw her up, when they had no money, it would amount [92] to about \$11,000, I should judge.

Q. Did you hear Mr. Sooy testify a little earlier?

A. He was right.

Q. That is, that \$11,000—

A. About \$11,000, in the neighborhood of \$11,000. I could not tell exactly.

Q. And \$8,000 of that went into the vessel—I mean went into the vessel as permanent improvements on the vessel?

A. Yes, but you must understand that the crew was paid, and there were libels and one thing and another on the things that had to be paid.

Q. You were down there when these goods were being furnished to her, were you not?

A. I was down there from time to time; Captain Larson had full charge of the work with this man, this carpenter, and also Mr. Mills.

Q. And you knew that these men down there were supplying these things to the vessel, didn't you?

A. Yes, I knew, because I knew they were to settle it with Levick & Oliver, not with me; they knew I had nothing.

(Testimony of John Roberts.)

Q. You ordered part of them yourself, didn't you?

A. I ordered them for that voyage; I got a leave of absence for three weeks to go on this trip to Ensenada from the Luckenbach Steamship Company, I was working for them.

Q. You took the "South Coast" back, didn't you, from Levick & Oliver?

A. No, I did not, they just simply threw it at me.

Q. It came back to you with this \$8,000 worth of improvements and tanks and the other things, and you have got those now, haven't you, there on board the "South Coast"?

A. I am telling you that we did not get \$8,000, because there was \$8,000 spent paying for crews and everything of that kind.

Q. The \$8,000 was spent for the crew and for the supplies and other things?

A. For supplies and one thing and another, and [93] then they spent—I don't know how much they spent.

Q. Didn't you testify just a moment ago that \$3,000 of that money went to the crew, and for supplies—what is the fact about it, Captain? How much did the tanks and the other repairs that you say were done to enable her to pass inspection cost?

A. The tanks in the neighborhood of \$2,800.

Q. What did all the other things that enabled her to pass inspection cost,—about \$8,000?

A. Well, I am telling you that the crew, paying them off, after she made her voyage to Mexico—

Q. —That cost \$2,000 more, didn't it?

(Testimony of John Roberts.)

A. It was \$11,000.

Q. And \$8,000 of it Captain, went into—

A. —Repairs.

Q. Into repairs and tanks?

A. I could not say that it did; I could not say; it would probably cost \$8,000.

Q. That is your best impression, your best judgment? A. Yes.

Q. Do you remember Rudbach being with you at the time you went over the vessel when she was being made ready to pass the United States inspection?

A. Yes, he helped me.

Q. He helped you and he furnished those goods there under your orders, didn't he? A. Yes.

Q. Now Captain, after going over this again, don't you remember telling Rudbach that the vessel was responsible for those bills that he had owed him?

A. Mr. Lillick, how could I tell Mr. Rudbach? How could I tell him such a thing as that, when it was not so.

Q. You say that is not so?

A. It is not so, no.

Q. Do you testify Captain—this is very serious, Captain—do you testify here under oath, that you never told Captain Rudbach?

A. I never told him.

Q. Let me finish my question. That you never told Captain Rudbach [94] that the steamer was responsible for those bills and he would get his money?

A. Mr. Lillick, how could I tell him that when the

(Testimony of John Roberts.)

vessel was under repairs to Levick & Oliver—I could not tell him that.

Q. She was under repairs to Levick & Oliver, but didn't you tell Rudbach that? A. No.

Q. Didn't tell him that at San Francisco after these bills were furnished, after these goods were furnished?

A. No, I did not; I could not have told him such a thing as that.

Q. You did not tell him that after you had been to my office to talk about this with me?

A. I never told him such a thing as that.

Q. You absolutely deny it? A. Yes.

Mr. CERF.—We rest.

Testimony of J. C. Rudbach, for Libelant (Recalled in Rebuttal).

Mr. RUDBACH, recalled in rebuttal.

Mr. LILLICK.—Q. Captain Rudbach, you have just heard Captain Roberts testify before he left the stand, that he never told you that the steamer "South Coast" would be responsible for these bills of yours. What do you say to that?

A. He not only told me on one occasion but he told me at the very least on half a dozen occasions.

Q. Have you in mind any occasion when someone else was present at such conversations?

A. Yes, at one conversation Captain Larson was present when we talked about insurance. Do you want me to explain that?

Q. By all means.

A. After they came back from Ensenada and be-

(Testimony of J. C. Rudbach.)

fore she was going away again, and after they had refused to [95] pay me, claiming they had no money, and so forth, that Levick & Oliver should pay these bills, and that would be all right, I said, "Captain, I will hold the ship responsible for those goods, you know they are charged to the ship," and I said, "This Levick & Oliver stuff I have nothing to do with it, because I do not look to them for anything, if they pay me well and good, I am satisfied, but I look to the ship and owners"; I said, "All I have is the ship now if anything should happen, and if the ship got lost you perhaps would not feel like going down into your pockets and pay these bills," as I understood he was the owner and I wanted to know if the ship was insured, and he said, "the ship is insured and the ship is responsible for your bills and don't worry about it."

Q. Are you positive about that, that "the ship is responsible for your bills and don't worry about it"?

A. Yes.

Q. You are positive about it?

A. Yes, positive.

Q. Now, about that conversation that you had with Mr. Mills with reference to the responsibility of the owners of the vessel, will you go over that again and give me your version of it?

Mr. CERF.—Just a minute, if it is the idea of counsel to ask for a repetition of testimony which has already been given by this particular witness I object to it on that ground.

The COURT.—The objection will be sustained

(Testimony of J. C. Rudbach.)

We had his conversation.

Mr. LILLICK.—We had the conversation but the captain during the lunch hour gave me a statement about something that he wanted to state.

The COURT.—Let it go in.

Mr. LILLICK.—Captain Rudbach I understand Mr. Mills told you that he had received a notice from Mr. Sooy? A. Yes.

Q. Was that notice that Mr. Mills testified about, and a carbon [96] copy of which was put in evidence; will you tell us what occurred after that with reference to your having inquired about the ownership of the vessel, if you did so inquire?

A. Yes, I inquired from Captain Larson afterwards.

Q. What did you say about it?

A. Well, I told Captain Roberts about it; I said, "You are the owner of this ship," and he said yes.

Q. Now, at that conversation with Captain Roberts when you talked to him about it, was anything said about who would be responsible for the bills ordered, whether the South Coast Steamship Company or the vessel was going to be responsible for it?

A. The vessel at that time; I told him I had been furnishing goods to this vessel now and I said, "they are all charged to the ship and the owners" and he says, "Well, old man, I know all about it," he said, "don't worry about it, the ship will be responsible for it."

Mr. CERF.—No questions.

Testimony of Peter L. Larson, for Libelant (in Rebuttal).

PETER L. LARSON, called for the libelant in rebuttal, sworn.

Mr. LILLICK.—Q. Captain Larson, you were one of the captains of the steamer “South Coast” during the time when Mr. Rudbach furnished supplies for her, were you not? A. Yes.

Q. Do you remember any conversation that occurred where Captain Roberts was asked by Mr. Rudbach, “Is your vessel insured”? A. Yes.

Q. In that conversation did Mr. Rudbach say to Captain Roberts “I am going to hold the vessel responsible for my bills?”

A. I did not hear that, but he said “you are protected.”

Q. Instead of my asking you questions in that way Captain, tell us your recollection of what if anything Captain Roberts said to Captain Rudbach about the vessel being responsible for those [97] bills and he would get his money?

A. The conversation took place in San Pedro, in which Captain Rudbach said to Captain Roberts, I was standing alongside of them—“You know Captain, I could not afford to lose these bills, the ship may be leaving this port; you are here now,” he says, “and I want to know from you what is going to be done.” Captain Roberts says, “That is all right, old man, you will be taken care of, you are all right.” Then Captain Rudbach says, “How, in what way—is

(Testimony of Peter L. Larson.)

the ship insured?" and Captain Roberts says, "Yes, and you will be protected."

Q. Do you remember whether anything was said at that conversation by Roberts that the vessel would be responsible for the bills? A. I did not hear that.

Q. Captain, you came up to San Francisco after this vessel was libeled did you not, or was it before?

A. After she was libeled.

Q. And you brought to my office certain bills of other people, did you not? A. Yes.

Q. Did you have any conversation with Captain Roberts about the responsibility of the steamer "South Coast" for those bills, that is, the bills which you brought up?

A. With Captain Roberts?

Q. Yes. A. I saw him, but he disputed them.

Q. You saw him but he disputed them? A. Yes.

Q. During the time you were captain of the vessel you ordered certain supplies yourself, did you not?

A. I bought some under orders from Mr. Mills; when I was engaged in San Francisco and took the boat down Mr. Sooy gave me instructions in his office in this way, "Do all you can now," and he said, "Captain Roberts will meet you in San Pedro at your arrival and give you full instructions"; the day we came into San Pedro Captain Roberts came out in a tug and met us, and [98] placed us in a berth for repairs; I said "Captain Roberts, what are the instructions, who is going to buy the stock, who is going to engage the carpenter and who is going to attend to all these things?"

(Testimony of Peter L. Larson.)

He said, "Mr. Mills." I went to Mr. Mills on the following day and he ordered such things as were necessary for the repairs.

Q. Were these repairs made upon the vessel, Captain? A. Yes.

Q. Did you order certain things from Captain Rudbach here?

A. Yes, but not before several orders were given by Mr. Mills.

Q. Now, on those things that you ordered, were they delivered on the vessel? A. Yes.

Q. Were they used on the vessel? A. Yes.

Q. Could the vessel have gone to Mexico without them? A. No.

Mr. CERF.—No questions.

Mr. LILLICK.—We rest.

(Thereupon the case was submitted upon briefs 10, 10 and 5.)

[Endorsed]: Filed Jul. 22, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [99] |

In the District Court of the United States, in and for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,939.

J. C. RUDBACH,

Libellant,

vs.

The Steamer "SOUTH COAST," Her Engines, etc.,
Respondent.

SOUTH COAST STEAMSHIP COMPANY,
Claimant,

**Opinion and Order to Enter Decree in Favor of the
Libelant for the Amount Prayed for.**

IRA S. LILLICK, Esq., Proctor for Libelant.

MERCEL E. CERF, Esq., H. W. GLENSOR,
Esq., and CHARLES H. SOOY, Esq., Proc-
tors for Respondent and Claimant.

Libelant furnished supplies at various times to the Steamer "South Coast" in the harbor of San Pedro, each time on the order of the person then her master. The vessel was, during this period, being operated by one Levick under a charter from the owners, which charter was also in the nature of a conditional bill of sale, or option to purchase. Libelant before furnishing any of the supplies in question was informed that the vessel was under charter to Levick and had been warned by the owners of the vessel not to have any bills go on the ships account, and had also been advised that Levick and Oliver would pay the bills. To this he replied that it was immaterial to him who paid the bills, but that he would not sell any goods to the ship in any other way than by charging them to the ship and her owners; and if they did not want [100] it that way he would not deliver any goods. This was stated by him to one Mills, who first informed him that Levick was operating the ship, and who had been directed by the owners to give him warning not to sell on the credit of the ship. He was also warned by Mr. Sooy one of the owners not to deliver any goods on the credit of the ship. So that if the owners, after the delivery of the ship to the charterers, had any power to prevent

the attaching of a lien for supplies by warning the libellant not to furnish such supplies on the credit of the ship, such warning was clearly and definitely given.

The charter in question contains the following provisions:

“Fifth:—It is understood that this charter is a charter of the bare vessel, and that the party of the second part (Levick) shall furnish the crew, pay their wages, victual them, furnish all deck and engine room and saloon stores, and supplies of every kind and nature; pay for all fuel, fresh water, port charges, wharfages, customs charges, customs fines or Government fines, pilotages, over time of crew; agencies, commissions, consular charges, dry docking, painting of the hull of said vessel, furnishing all lines and slings, and pay all charges whatsoever of every nature, whether of the same kind as hereinabove enumerated or otherwise, that may be incurred in or about the use of said vessel during the term of this charter.”

“Tenth:—Said party of the second part further covenants * * * that if said payments (charter hire) be not made, then at the option of the first party said vessel will be delivered to the said party of the first part * * * free from all liens and claims of every kind or description whatsoever during the term of this charter-party, except the lien for any salvage services that may be rendered to said vessel, and that he, the said party of the second [101] part, will hold and save harmless the said

party of the second part from all liens, claims or demands upon or against the said vessel that may be preferred against the said party of the first part or against the said vessel, and arising or created during the term of this charter-party, except any claim for salvage services that may be rendered to said vessel; and further, will save said party of the first part harmless from all liens, losses, damages, costs or expenses that said party of the first part may sustain or be put to in consequence of such liens, claims or demands, or in respect to any litigation arising out of or in respect thereto or connected therewith."

While these provisions require the charterer to pay all expenses incurred in operating the vessel they do not deprive him of authority to bind the vessel therefor. Indeed they seem rather to concede to him such authority by providing that he shall save the owners harmless from all liens against the vessel arising or created during the term of the charter-party. The Act of June 23d, 1910, gives a maritime lien to any person furnishing supplies to a vessel, whether foreign or domestic, upon the order of the owners, which lien may be enforced without alleging or proving that credit was given to the vessel. It also provides that the managing owner, ship's husband, or master, appointed by a charterer, or an agreed purchaser in possession of the vessel, shall be presumed to have authority from the owner to procure such supplies.

The only condition upon which such lien may not be created is found in the following words of the

Act "but nothing in this act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of the charter-party, agreement for sale of the vessel or for any other reason, the person ordering [102] the supplies was without authority to bind the vessel therefor." But by the charter in the instant case the person ordering the supplies, that is to say, the master, was not without authority to bind the vessel therefor. And while the owners took every precaution to warn the furnisher of the supplies not to have any of them go on the ship's account, they did not take the essential and fundamental precaution to provide by the terms of the charter that the charterer, or the master appointed by him, should be without authority to bind the vessel therefor. The case presented here is different from that of the *Eureka* (209 Fed. 373) because in that case the option to purchase provided that the holder of the option, though given possession of the vessel, should not incur any lien upon her, nor make any purchases on her account. The present charter contains no such provision, but on the contrary by its very terms contemplates that the charterer should have authority to bind the vessel, and the owners having executed such a charter and delivered the vessel thereunder, were thereafter without power to prevent the creation of the liens provided for by the Act above mentioned,—their remedy being against the charterer upon his agreement to hold them harmless from such liens.

A decree will be entered for the amount prayed for.

June 7th, 1916.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Jun. 7, 1916. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [103]

*In the District Court of the United States, for the
Northern District of California.*

At a stated term of the District Court of the United States of America, for the Northern District of California, held in the City and County of San Francisco, on Thursday, the 8th day of June, one thousand nine hundred and sixteen. Present: M. T. DOOLING, District Judge.

IN ADMIRALTY—No. 15,939.

J. C. RUDBACH,

Libelant,

vs.

The Steamer "SOUTH COAST," Her Engines,
Boilers, Machinery, Tackle, Apparel and Fur-
niture,

Respondent.

SOUTH COAST STEAMSHIP CO., a Corporation,
Claimant.

Final Decree.

The above-entitled cause having come on regularly for hearing and having been heard upon the pleadings and proofs, and having been argued and submitted by

the proctors for the respective parties, and, in accordance with the opinion heretofore filed herein, and the stipulation dated December 23, 1915, entered into between the proctors for the respective parties hereto, and due deliberation having been had, on motion of Ira S. Lillick Esq., proctor for libelant, it is

Ordered that the libelant, J. C. Rudbach, do have and recover in this action against the steamer "South Coast," etc., the sum of Fourteen Hundred Seventy-four and 55/100 Dollars (\$1474.55), being the amount prayed for in the libel on file herein, including interest on said amount from the first day of November, 1915, to the date hereof, at the rate of seven (7) per [104] cent per annum, and that said libelant do have and recover against the said vessel the said sum, with interest thereon at the rate of seven (7) per cent per annum from the date hereof and until paid, together with libelant's costs to be taxed;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED, that, in accordance with the terms of the stipulation hereinbefore referred to, the following named claimants do have and recover against the said steamer the respective amounts hereinafter set opposite their respective names, with interest thereon at the rate of seven (7) per cent per annum from the first day of September, 1915, and until paid:

NAMES:	AMOUNTS.
M. G. Didricksen.....	\$ 7.
H. Ekrem	7.25
Montgomery & Buckley.....	9.
Los Angeles Boiler Works.....	1.50

NAMES:	AMOUNTS.
Al Larson	16.36
A. Young	12.
San Pedro Marine-Engine Works.....	136.75
W. B. Hipple Machine Shop.....	622.06

M. T. DOOLING,
District Judge.

San Francisco, California, June 8, 1916.

Reserving all rights to appeal from the decree herein, the undersigned, proctors for the claimant, South Coast Steamship Co., hereby stipulate that, in accordance with the agreements entered into upon the 23d day of December, 1915, between the proctors for the respective parties hereto, the said decree may provide for the entry of judgment against the steamer "South Coast," for the sums set opposite the respective names of the claimants named in said decree, other than the libelant.

MARCEL E. CERF,
C. H. SOOY,

Proctors for Claimant, South Coast Steamship Co.

[Endorsed]: Filed Jun. 8, 1916. W. B. Maling,
Clerk. By T. L. Baldwin, Deputy Clerk. [105]

*In the District Court of the United States, in and for
the Northern District of California, First Divi-
sion.*

IN ADMIRALTY—No. 15,939.

J. C. RUDBACH,

Libelant,

vs.

The Steamer "SOUTH COAST," etc.,

Respondent.

SOUTH COAST STEAMSHIP CO., a Corporation,
Claimant.

Notice of Appeal.

To the Clerk of said Court and to Ira S. Lillick,
Proctor for Libelant:

Please take notice that South Coast Steamship Co., a corporation, claimant in the above-entitled libel, hereby appeals to the next United States Circuit Court of Appeals for the Ninth Circuit, to be held in and for said Circuit, at the City and County of San Francisco, in the Northern District of California, from the final decree made and entered in said libel on the 8th day of June, 1916.

Dated at San Francisco, California, this 17th day of June, 1916.

MARCEL E. CERF,
C. H. SOOY,

Proctors for Claimant and Appellant.

Received copy of within Notice of Appeal, June 17, 1916.

IRA S. LILLICK,
Proctor for Libelant.

[Endorsed]: Filed Jun. 17, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [106]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

IN ADMIRALTY—No. 15,939.

J. C. RUDBACH,

Libelant and Appellee,
vs.

The Steamer "SOUTH COAST," etc.,

Respondent.

SOUTH COAST STEAMSHIP CO., a Corporation,
Claimant and Appellant.

Assignment of Errors.

South Coast Steamship Company, a corporation, claimant in the above-entitled libel, hereby assigns error to the decree of the District Court of the United States in and for the Northern District of California, First Division, in the said libel, in the particulars hereinafter specified:

1st. The Court erred in holding that the persons who ordered the supplies furnished by the libelant, were authorized to bind the vessel, the steamship "South Coast," therefor.

2d. The Court erred in holding that the persons who ordered the supplies furnished by the libelant, were not without authority to bind the vessel, the steamship "South Coast," therefor.

3d. The Court erred in holding that the char-

terer of said vessel was not deprived of authority to bind the vessel for the expenses incurred in operating her.

4th. The Court erred in holding that the person ordering the supplies furnished by the libelant, that is the master of the vessel, the steamship "South Coast," was not without authority to bind the vessel therefor.

5th. The Court erred in holding that in order that a [107] vessel shall not be subject to a lien for supplies furnished at the instance of a charterer, it is essential and fundamental to provide by the terms of the charter-party, that the charterer or the master appointed by him, should be without authority to bind the vessel therefor.

6th. The Court erred in holding that the charter-party by which the vessel, the steamship "South Coast," was chartered to Levick contained no such provision, as one whereby the charterer, though given possession of the vessel, should not incur any lien upon her, or make any purchases on her account.

7th. The Court erred in holding that the charter-party, by its very terms, contemplates that the charterer should have authority to bind the vessel.

8th. The Court erred in holding that the libelant did not know or by the exercise of reasonable diligence could not have ascertained, that the persons ordering the supplies furnished by the libelant, were without authority to bind the vessel, the steamship "South Coast" therefor.

9th. The Court erred in not dismissing the libel with costs.

10th. The Court erred in entering a decree in favor of the libelant and against the steamship "South Coast."

11th. The Court erred in allowing interest at the rate of seven per cent per annum on the amounts which the Court found that the vessel should pay.

Dated June 26th, 1916.

MARCEL E. CERF,

C. H. SOOY,

Proctors for Claimant and Appellant.

Received a copy of within Assignment of Errors this June 26, 1916.

IRA S. LILLICK,

Proctor for Libelant and Appellee.

[Endorsed]: Filed Jun. 26, 1916. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [108]

In the District Court of the United States, for the Northern District of California, First Division.

IN ADMIRALTY—No. 15,939.

J. C. RUDBACH,

Libelant,

vs.

The Steamer "SOUTH COAST," Her Engines, Boilers, Machinery, Tackle, Apparel and Furniture,

Respondent.

SOUTH COAST STEAMSHIP CO., a Corporation,

Claimant.

Stipulation Regarding the Entry of Decree.

WHEREAS, a libel has been filed in the above-entitled court by J. C. Rudbach against the steamer "South Coast," for the reasons and causes in said libel mentioned; and

WHEREAS, M. G. Didricksen, H. Ekrem, Montgomery & Buckley, Los Angeles Boiler Works, Al Larson, A. Young, San Pedro Marine Engine Works and W. B. Hipple Machine-Shop, all being material and supply men of the city of San Pedro, State of California, furnished materials and supplies and performed repairs upon said steamer, "South Coast," during the period when said J. C. Rudbach also furnished materials to said vessel; and

WHEREAS, the claimants above named are all represented by Ira S. Lillick, the proctor representing the libelant in the above-entitled cause, and threaten to, and will unless some assurance is given them that their claims will be paid, file libels in intervention in the above-entitled cause, and cause the said steamer "South Coast" to be attached and seized under [109] process issued in said libels in intervention; and

WHEREAS, the parties to this stipulation and agreement desire to obviate the necessity of the costs attendant upon filing such libels in intervention on behalf of said claimants;

NOW, THEREFORE, IT IS HEREBY STIPULATED and agreed that liability for said demands of said claimants for materials and supplies to said

steamer may be determined by such final decree rendered in the above-entitled cause by the said Court, or, in case of appeal, or writ of certiorari, by the court to which said cause may be appealed, or certified; and

In the event that said steamer "South Coast" shall be held under such decree to be liable to J. C. Rudbach for the materials and supplies furnished to her by him, amounting to \$1,253.73 as prayed for in said libel of J. C. Rudbach, then, and in that event, and as a part of the decree entered in the above-entitled cause, the said decree may, and it shall, also provide for the entry of judgment against the said steamer "South Coast" in favor of the following named claimants in the amounts specified opposite each of their respective names, viz.:

M. G. Didricksen.....	\$ 7.
H. Ekrem.....	7.25
Montgomery & Buckley.....	9.
Los Angeles Boiler Works.....	1.50
Al Larson.....	16.36
A. Young.....	12.
San Pedro Marine Engine Works..	1.50
San Pedro Marine Engine Works..	135.25
W. B. Hipple Machine-Shop.....	622.06

Dated, San Francisco, Cal., December 23, 1915.

SOUTH COAST STEAMSHIP COMPANY.

By C. H. SOOY,

Secretary.

H. EKREM,

M. G. DIDRICKSEN,

JOHN MONTGOMERY. [110]

W. M. PARKER, JR.,

SAN PEDRO MARINE ENG. WKS.,

A. YOUNG,

W. B. HIPPLE MACHINE-SHOP,

W. B. HIPPLE, Prop.

MARCEL E. CERF,

H. W. GLENSOR,

C. H. SOOY,

Proctors for Claimant, South Coast Steamship Co.

IRA S. LILLICK,

Proctor for Claimants Above Named.

San Francisco, Cal., December 23, 1915.

To Ira S. Lillick, Esq., Proctor for M. G. Didricksen,

H. Ekrem, Montgomery & Buckley, Los An-

geles Boiler Works, A. Larson, A. Young, San

Pedro Marine Engine Works and W. B. Hipple

Machine-Shop:

In consideration of your not filing libels against the steamer "South Coast," in order to attempt to recover the amounts claimed to be due the above-named claimants from the steamer "South Coast," and in further consideration of your signing the stipulation hereto annexed, the undersigned hereby agrees to hold out of any money realized from the sale of the steamer "South Coast," or from any in-

surance or charter money paid the South Coast Steamship Co., by reason of its ownership of said vessel, a sufficient amount to pay the claimants above named, with such interest as may be provided by such decree as may be entered in the case of Rudbach vs. the Steamer "South Coast," referred to in said stipulation.

SOUTH COAST STEAMSHIP COMPANY.

By C. H. SOOY.

MARCEL E. CERF.

H. W. GLENSOR. (Seal)

H. EKREM.

M. F. DIDRICKSEN.

W. M. PARKER, JR.

SAN PEDRO MARINE ENG. WKS.

A. YOUNG,

W. B. HIPPLE MACHINE-SHOP.

W. B. HIPPLE, Prop.

[Endorsed]: Presented in open court and filed March 14, 1916. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [111]

CLAIMANT'S EXHIBIT "B."

June 26, 1915.

Mr. E. A. Mills,

Pacific Wharf & Warehouse Co.,

East San Pedro, Cal.

Dear Sir: Under the provisions of charter and option given by the South Coast Steamship Co., the owner of the S. S. South Coast, to Mr. Levick, the repairs now being made to this vessel are to be made for the credit of Mr. Levick and not upon the credit

of the vessel. This is also true as to any supplies that may be furnished the vessel or on account of any labor furnished thereto. Carrying out the agreement with Mr. Levick *all* of the persons, firms or corporations furnishing supplies, labor or materials to said vessel are to be notified either by you, or ourselves that they cannot hold the vessel for any supplies, labor or materials furnished the said vessel. Upon receipt of this letter you will therefore please notify all persons furnishing said supplies, labor or materials to the vessel that they must look to Mr. Levick and not to the vessel for payment of same. Please notify me in answer to this that you have done as requested, and let me know the names of the people whom you have notified. I would rather, on account of relationships, have you notify these people than for us to write the letters, because if we wrote it it might in some way injure Mr. Levick, and this I do not wish to do. I have just been informed by Mr. Levick and Mr. Oliver that he has arranged for insurance on the vessel after repairs are made. Thanking you in advance for this courtesy, I am,

Very truly yours, [112]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

IN ADMIRALTY—No. 15,939.

J. C. RUDBACH,

Libelant,

vs.

The Steamer "SOUTH COAST," Her Engines, etc.,
Respondent.

SOUTH COAST STEAMSHIP COMPANY, a
Corporation,

Claimant.

**Stipulation and Order Extending Time to File
Apostles to August 16, 1916.**

It is hereby stipulated and agreed by and between the parties hereto that the appellant, South Coast Steamship Company, may have to and including the 16th day of August, 1916, within which to file its apostles on appeal in the above-entitled action.

Dated July 17, 1916.

IRA S. LILLICK,

Proctors for Libelant and Respondent.

MARCEL E. CERF,

C. H. SOOY,

Proctors for Claimant and Appellant.

By the Court:

It is so ordered.

Dated July 17, 1916.

WM. W. MORROW,

Judge.

[Endorsed]: Filed Jul. 17, 1916. W. B. Maling,
Clerk. By T. L. Baldwin, Deputy Clerk. [113]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

IN ADMIRALTY—No. 15,939.

J. C. RUDBACH,

Libelant,

vs.

The Steamer "SOUTH COAST," Her Engines, etc.,
Respondent.

SOUTH COAST STEAMSHIP CO., a Corporation,
Claimant.

**Stipulation and Order Extending Time to File
Apostles to September 16, 1916.**

It is hereby stipulated and agreed by and between
the parties hereto that the appellant, South Coast
Steamship Company, may have to and including the
16th day of September, 1916, within which to file its
apostles on appeal in the above-entitled action.

Dated August 16, 1916.

IRA S. LILLICK,

Proctor for Libelant and Respondent.

MARCEL E. CERF,

C. H. SOOY,

Proctors for Claimant and Appellant.

By the Court:

It is so ordered.

Dated August 16, 1916.

M. T. DOOLING,

Judge.

[Endorsed]: Filed Aug. 16, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [114]

*In the District Court of the United States, in and for
the Northern District of California, First Division.*

IN ADMIRALTY—No. 15,939.

J. C. RUDBACH,

Libelant,

vs.

The Steamer "SOUTH COAST," Her Engines, etc.,
Respondent.

SOUTH COAST STEAMSHIP COMPANY, a Corporation,

Claimant.

**Stipulation and Order Extending Time to File
Apostles to October 1, 1916.**

It is hereby stipulated and agreed by and between the parties hereto that the claimant and appellant in the above-entitled action may have to and including the 1st day of October, 1916, within which to file its apostles on appeal in the said action.

Dated September 18, 1916.

IRA S. LILLICK,
Proctor for Respondent.
MARCEL E. CERF,
C. H. SOOY,
Proctors for Appellant.

By the Court:

It is so ordered.

Dated September 18, 1916.

M. T. DOOLING,
Judge.

[Endorsed]: Filed Sep. 18, 1916. W. B. Maling,
Clerk. By C. W. Calbreath, Deputy Clerk. [115]

**Certificate of Clerk U. S. District Court to Apostles
on Appeal.**

I, Walter B. Maling, Clerk of the District Court of the United States of America, for the Northern District of California, do hereby certify that the foregoing 115 pages, numbered from 1 to 115, inclusive, contain a full, true and correct Transcript of certain records and proceedings, in the case of J. C. Rudbach, vs. The Steamer "South Coast," etc., No. 15,939, as the same now remain on file and of record in this office, said Transcript having been prepared pursuant to and in accordance with the Praecipe, (copy of which is embodied in this transcript), and the instructions of the proctors for respondent and appellant herein.

I further certify that the costs for preparing and certifying the foregoing Apostles on Appeal is the sum of Sixty Dollars and Twenty Cents (\$60.20), and that the same has been paid to me by the proctors for the appellant herein.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 29th day of Sept., A. D. 1916.

[Seal]

WALTER B. MALING,

Clerk.

By C. W. Calbreath,

Deputy Clerk. [116]

[Endorsed]: No. 2865. United States Circuit Court of Appeals for the Ninth Circuit. South Coast Steamship Company, a Corporation, Claimant of the Steamer "South Coast," etc., Appellant, vs. J. C. Rudbach, Appellee. Apostles on Appeal. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Filed September 30, 1916.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 2865

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTH COAST STEAMSHIP COMPANY (a corporation), claimant of the steamer "South Coast", etc.,

Appellant,

VS.

J. C. RUDBACH,

Appellee.

BRIEF FOR APPELLANT.

MARCEL E. CERF AND C. H. SOOY,
Counsel for Appellant.

Filed this.....day of February, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

No. 2865

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTH COAST STEAMSHIP COMPANY (a corporation), claimant of the steamer "South Coast", etc.,

Appellant,

VS.

J. C. RUDBACH,

Appellee.

BRIEF FOR APPELLANT.

Preface.

The precise point involved in this controversy was decided by Judge Lowell in one of the most scholarly opinions available on a maritime question (*The Underwriter*, 119 Fed. 713, 759-764). Consequently, unless the law applicable to the facts of this case was altered by the Act of June 23, 1910, we respectfully submit that the libel should have been dismissed. That the law was not so altered appears conclusively from *The Francis J. O'Hara, Jr.*, 229 Fed. 312.

Statement.

We cannot better present a concrete abstract or statement of this case than to quote the opening portion of the opinion of the learned District Judge who tried the cause. Judge Dooling said:

“Libelant furnished supplies at various times to the steamer ‘South Coast’ in the harbor of San Pedro, each time on the order of the person then her master. The vessel was, during this period, being operated by one Levick under a charter from the owners, which charter was also in the nature of a conditional bill of sale, or option to purchase. Libelant before furnishing any of the supplies in question was informed that the vessel was under charter to Levick and had been warned by the owners of the vessel not to have any bills go on the ships account, and had also been advised that Levick and Oliver would pay the bills. To this he replied that it was immaterial to him who paid the bills, but that he would not sell any goods to the ship in any other way than by charging them to the ship and her owners; and if they did not want it that way he would not deliver any goods. This was stated by him to one Mills, who first informed him that Levick was operating the ship, and who had been directed by the owners to give him warning not to sell on the credit of the ship. He was also warned by Mr. Sooy one of the owners not to deliver any goods on the credit of the ship. So that if the owners, after the delivery of the ship to the charterers, had any power to prevent the attaching of a lien for supplies by warning the libelant not to furnish such supplies on the credit of the ship, such warning was clearly and definitely given.

“The charter in question contains the following provisions:

‘Fifth:—It is understood that this charter is a charter of the bare vessel, and that the party of the second part (Levick) shall furnish the crew, pay their wages, victual them, furnish all deck and engine room and saloon stores, and supplies of every kind and nature; pay for all fuel, fresh water, port charges, wharfages, customs charges, customs fines or Government fines, pilotages, over time of crew; agencies, commissions, consular charges, dry docking, painting of the hull of said vessel, furnishing all lines and slings, and pay all charges whatsoever of every nature, whether of the same kind as hereinabove enumerated or otherwise, that may be incurred in or about the use of said vessel during the term of this charter’.

‘Tenth:—Said party of the second part further covenants * * * that if said payments (charter hire) be not made, then at the option of the first party said vessel will be delivered to the said party of the first part * * * free from all liens and claims of every kind or description whatsoever during the term of this charter-party, except the lien for any salvage services that may be rendered to said vessel, and that he, the said party of the second part, will hold and save harmless the said party of the second part from all liens, claims or demands upon or against the said vessel that may be preferred against the said party of the first part or against the said vessel, and arising or created during the term of this charter-party, except any claim for salvage services that may be rendered to said vessel; and further, will save said party of the first part harmless from all liens, losses, damages, costs or expenses that said party of the first part may sustain or be put to in consequence of such liens, claims or demands, or in respect to any litigation arising out of or in respect thereto or connected therewith’ ”. (Apostles, pp. 121-123).

Specifications of Error.

We think we cannot better specify the errors which, we respectfully submit, were committed by the learned trial Judge, than to quote from his opinion and to indicate, by the use of bold type, the source of what we conceive to be the errors which lead to the decree for the libellant. In his opinion, the learned District Judge said:

“While these provisions require the charterer to pay all expenses incurred in operating the vessel they do not deprive him of authority to bind the vessel therefor. Indeed they seem rather to concede to him such authority by providing that he shall save the owners harmless from all liens against the vessel arising or created during the term of the charter-party. The Act of June 23d, 1910, gives a maritime lien to any person furnishing supplies to a vessel, whether foreign or domestic, upon the order of the owners, which lien may be enforced without alleging or proving that credit was given to the vessel. It also provides that the managing owner, ship’s husband, or master, appointed by a charterer, or an agreed purchaser in possession of the vessel, shall be presumed to have authority from the owner to procure such supplies.

The only condition upon which such lien may not be created is found in the following words of the Act ‘but nothing in this act shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of the charter-party, agreement for sale of the vessel or for any other reason, the person ordering the supplies was without authority to bind the vessel therefor’. **But by the charter in the instant case the person ordering the supplies, that is to say, the master, was not**

without authority to bind the vessel therefor. And while the owners took every precaution to warn the furnisher of the supplies not to have any of them go on the ship's account, they did not take the essential and fundamental precaution to provide by the terms of the charter that the charterer, or the master appointed by him, should be without authority to bind the vessel therefor. The case presented here is different from that of the *Eureka* (209 Fed. 373) because in that case the option to purchase provided that the holder of the option, though given possession of the vessel, should not incur any lien upon her, nor make any purchases on her account. **The present charter** contains no such provision, but on the contrary **by its very terms contemplates that the charterer should have authority to bind the vessel, and the owners having executed such a charter and delivered the vessel thereunder, were thereafter without power to prevent the creation of the liens provided for by the Act above mentioned,—their remedy being against the charterer upon his agreement to hold them harmless from such liens.**" (Apostles, pp. 123-124.)

The conclusions reached by Judge Lowell in *The Underwriter* (referred to in our "preface") are quite the reverse. Following a profound exposition of the history of maritime liens for supplies and repairs, Judge Lowell reflects upon the facts of his case, the principles evolved from his treatise and states his conclusions as follows (119 Fed. 759-764. The italics are our own):—

"It remains to consider the case at bar in the light of the results already reached. Did this owner assent to the lien in the case? Did he lead the materialman to believe in his assent? Ought the materialman to have known that the owner dissented? All the circumstances by

which the lien is ordinarily created or from which it is ordinarily presumed are here present,—the foreign port, the order of the master, the absence of the owner, the need of supplies if the vessel is to navigate, the necessity of pledging the credit of the vessel if the supplies are to be procured. To this the defense is: Want of authority in the master, known to the materialman, to create the lien upon the vessel. What is meant by the Master's want of authority in a matter like this? No law ever provided baldly that the repairer of a vessel should always have a lien. My vessel lies at a wharf out of repair, and she is repaired by a mere trespasser. In general he has no lien under any system of law. The repairs must be ordered or authorized by some one in authority, and the master is ordinarily such a person either at home or abroad; that is to say, the master ordinarily has authority to license the act of repairing. If authorized by him it is no longer a trespass. If the owner has given the master express authority to contract for repairs or supplies, the owner is bound personally. If the repairs are within the scope of the authority which the maritime law attributes to the master, and that authority has not been specially limited, the owner or the charterer, that person of whom the master is agent, is personally bound to pay for the repairs. All this is a development of the ordinary law of agency. By English law it seems that the owner is bound, even if the advances for repairs, etc., are made in a domestic port. *Abb. Shipp.* (7th Am. Ed.), 186; *Arthur v. Barton*, 5 Mees. & W. 138; *Johns v. Simons*, 2 Q. B. 425; *The Lochiel*, 2 W. Rob. Adm. 45. See *Speerman v. Degrave*, 2 Vern. 643. The owner is bound by the act of his authorized agent, as if he had ordered the repairs himself. If the owner is actually present in the port, something more than the ordinary implied authority of the

master may be necessary to bind the owner for repairs, even if not for supplies. By a peculiarity of the maritime law the master also is bound individually, but this peculiarity need not concern us here. *Whatever be the authority ordinarily given to a master, if in the particular case he has no authority to bind his principal, and if the material man knows this want of authority, the owner or principal cannot be held.* This also is the familiar law of agency. So, if the master has no authority to permit the materialman to make the repairs, and the materialman, who makes them on the master's order, knows this want of authority, it is hard to see how he can justify his trespass. If he knows that the master is forbidden to create a debt binding upon the owner, he cannot hold the owner. If he knows that the master is forbidden to permit the creation of a lien on the ship, he cannot claim a lien. Put the case in another way: If the materialman knows that the master is forbidden to repair, even in a foreign port, it would seem that he cannot proceed against either owner or vessel. If he knows that the master is permitted to repair, but only upon the condition that the repairs are chargeable neither to the owner nor to the vessel, then, if he makes the repairs on the order of the master, and without objection, it would seem that he impliedly waives his lien upon the vessel. See Emerigon, in Hall's Maritime Loans, 89, 90. It is true that the maritime law and its codes give great power to the master. But these powers must be subject to enlargement and diminution by agreement between owner and master. In general, the latter cannot hold the former by the general rules of maritime law against an express agreement duly entered into between them, and it is hard to see how he can bind him in contravention of the agreement to a third person who has knowl-

edge of its terms. We need not here discuss the statutory lien. The terms of the statute may expressly give to the master authority to create a lien, whether the owner authorizes it or not. See *The Kate*, 164 U. S. 458, 470; *The S. M. Whipple* (D. C.) 14 Fed. 354.

The mere fact that a vessel is known to be under charter does not deprive of his lien one who, in a foreign port, furnishes it with supplies on the order of the master. *The George Dumois*, 15 C. C. A. 675, 68 Fed. 926; *The Philadelphia*, 21 C. C. A. 501, 75 Fed. 684. *But if a charter or other contract limits the authority of the master in the matter of buying coal, and forbids him to buy it except upon the personal credit of the charterers only (and perhaps on his own personal credit) and if the libelant has notice of this limitation, it would seem that the lien either does not arise or is impliedly waived.* In *The Kate*, 164 U. S. 458, Mr. Justice Harlan said: (Here follows a quotation from the cited case).

The learned Justice also quoted from an opinion rendered by Judge Sprague in this court in *The Sarah Starr*, 1 Spr. 453, 455, Fed. Cas. No. 12,354, where it was said: (Here follows quotation subsequently appearing in our brief).

See *The Columbus*, 5 Sawy. 487, Fed. Cas. No. 3,044; *Swift v. The Albus*, Fed. Cas. No. 13,694; *The S. M. Whipple* (D. C.) 14 Fed. 354; *The Alvira* (D. C.) 63 Fed. 144.

In the *Bombay* (C. C.) 38 Fed. 863; *Id.* (D. C.) 38 Fed. 512 it is not stated if the libelants knew that the vessel was under charter, and it is said expressly that they had no notice of its provisions. By the French law it seems that the vessel is not bound for supplies ordered by the charterer unless the supplies are needed for the ship, apart from the special needs of the

charterer, and unless the owner, if present, would have ordered them. Desj. I, 256.

One argument in support of the Master's authority to bind the vessel, even when expressly forbidden to do so, should not be overlooked. Suppose the charter provides that the owner shall pay the wages of the crew. To put this charge upon the charterer is not uncommon. Suppose the crew to have knowledge that the charter forbids the charterer to create a lien for wages, it may be asked if the crew would lose their lien. In the case put they would have that knowledge of the master's limitation of authority which the materialmen are held to have had in the case at bar. Why should they fare any better? It is probable that the seamen's lien on the vessel would exist even in the case put,—that is to say, even though they knew that the master, in permitting it to arise, was guilty of bad faith. The seamen would be protected, however, not by the logical result of admitted principles of general law, but by reason of the favor shown to them in a court of admiralty. The wages of seamen are secured upon the vessel in many jurisdictions by a statute which admits of no exception. *Taking it as established, then, that the vessel is not bound even for necessary supplies furnished in a foreign port on the master's order, provided the materialman knows that the master is forbidden to create a lien for the purpose,* we next consider if the master's authority was so limited in this case. The limitation here contended for by the claimant is found in the charter party, whose material parts are as follows:

(2) The owner shall provide and pay for all the provisions, water, wages, and consular shipping and discharging fees of the captain, officers, engineers, firemen, and crew of said tug; shall pay for the insurance of the same; also

for all ship, cabin, engineroom, and deck stores; and maintain said tugs in a thoroughly efficient state in hull and machinery for and during the service, and including the necessary hawsers and lines for mooring and towing.

(3) The charterer shall provide and pay for all the coals, port charges, pilotages, agencies, and commissions, and all other charges whatsoever, except those before stated, and shall likewise, in case the owner deems it necessary to insure said tugs, or any of them, against war risks, pay the additional cost of the premium for such insurance.

The charterer shall accept and pay for all coals in the tugs' bunkers on delivery, and the owner shall, on the expiration of this charter party, pay for all coal left in the bunkers, each at the current market prices at the port of Boston when said tugs are delivered to them.

(6) The captains of said tugs, although appointed by the owner, shall be under the orders and direction of the charterer as regards employment, agency, or other arrangements, and the charterer hereby agrees to indemnify the owner from all consequences or liabilities that may arise from any irregularities in ship's papers, or from the captains signing bills of lading, or otherwise complying with the charterer's directions.

The court has to consider if this language is (1) a limitation on the authority of the captain, or (2) merely a contract made by the charterer with the owner that the former will pay for supplies in the first instance, and, in case this is not done for any reason, will reimburse the owner for supplies paid for by the latter. The language of the clauses might not unreasonably bear either construction. On general principles there is much to be said in support of the contention that a clause in a charter like that above quoted, providing that the char-

terer shall supply the vessel with coal, is intended merely as a contract between charterer and owner, and does not limit the general authority of the master to order coal for the vessel upon the vessel's credit in a foreign port. In *The Kate*, above cited, the provisions of the charter were much like those in this case, and the supreme court said at page 465, 164 U. S. page 138, 17 Sup. Ct. and page 512, 41 L. Ed. (Here follows quotation subsequently appearing in our brief).

There was a like charter in *The Valencia*, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710, and the court said at page 270, 165 U. S. page 325, 17 Sup. Ct., and page 710, 41 L. Ed.:

'Although the libelants were not aware of the existence of the charter party under which the *Valencia* was employed, it must be assumed, upon the facts certified, that by reasonable diligence they could have ascertained that the New York Steamship Company did not own the vessel, but used it under a charter party providing that the charterer should pay for all needed coal. The libelants knew that the steamship company had an office in the city of New York. They did business with them at that office, and could easily have ascertained the ownership of the vessel and the relation of the steamship company to the owners. They were put upon inquiry, but they chose to shut their eyes and make no inquiry touching these matters, or in reference to the solvency or credit of that company.'

See *Beinecke v. The Secret* (D. C.) 3 Fed. 665, quoted with approval by the supreme court in the last named case; *The Cumberland* (D. C.) 30 Fed. 449, 455; *The William Cook* (D. C.) 12 Fed. 919; *Neill v. The Francis* (D. C.) 21 Fed. 921; *The Solveig*, 43 C. C. A. 250, 103 Fed. 322; *The Stroma* (D. C.) 41 Fed. 599; *The Pirate* (D. C.) 32 Fed. 486.

In other cases it was assumed that, if the materialman had had knowledge of the existence of a charter like that in this case, he would have had no lien, although as no knowledge on his part was established, the lien was allowed. *The North Pacific*, 40 C. C. A. 510, 100 Fed. 490; *Norwegian S. S. Co. v. Washington*, 6 C. C. A. 313, 57 Fed. 224; *The Ellen Holgate* (D. C.) 30 Fed. 125. These cases construe the language used in this charter to forbid the master to pledge the credit of the vessel for the supplies he orders. Many of these cases, and others heretofore cited, also hold that the materialman is affected by the limitations of the charter if he has notice of them. There is much authority for the proposition that this charter, if brought to the notice of the materialman, will prevent him from getting a lien. It is true that there is authority upon the other side, and that the opinions of the supreme court just cited are not quite explicit. In the *City of New York*, Fed. Cas. No. 2,758, the lien was upheld in the case of a charter like this. The vessel was in a really distant port, however, and was in such peril that the limitation imposed on the master's authority by the charter may have been treated as inapplicable within the intent of the parties. The opinion is short. See *The Wm. Cook* (D. C.) 12 Fed. 919, 920. In *The Lucia B. Ives*, Fed. Cas. No. 8,590, the lien was upheld, but whether in reliance on the express terms of the statute or upon a doubt as to the meaning of the charter is not clear. In *The Monsoon*, Fed. Cas. No. 9,716, decided by Judge Sprague, in which that distinguished Judge upheld a lien upon a chartered vessel, it is doubtful if the decision was rested upon a supposed inability of the owner to limit the master's authority, or upon a construction of the charter in question. If the former, the case stands substantially alone; if the latter, it is opposed to the great weight of authority. See

The *H. B. Foster*, 3 Ware. 165, Fed. Cas. No. 6,291; *Rozo v. The Neversink*, Fed. Cas. No. 12,079; *The India* (D. C.) 14 Fed. 476; *Id.* (C. C.) 16 Fed. 262. The language of some of the opinions last cited is not clear, but the learned Judges who delivered them did not mean to hold that a materialman could claim a lien for supplies furnished a vessel where he knew that the person ordering the supplies was expressly forbidden to permit the vessel to become bound for them.

That a chartered vessel is ordinarily bound for the price of supplies ordered for her use in a foreign port by the master was expressly decided in this circuit in the case of *The Philadelphia*, and this is the law where the charter is silent upon the subject. *Where, however, the charter limitation is that found in this case, and where the coal is ordered, not in a port of distress, where it may reasonably be supposed that the further prosecution of the voyage is for the interest of the owner as well as for that of the charterer, I am of opinion that no lien exists."*

Brief of the Argument.

The points which we urge are these.

I.

The terms of a charter-party or agreement for the sale of a vessel are **NOT**, as Judge Dooling suggests they are, the exclusive source of a charterer's inability to create liens upon the vessel.

II.

By the terms of the charter-party in the instant case, and by virtue of the notice which the trial judge found was given libellant, the charterer and his masters and his agent, Mr. Mills (*Apostles* p. 27) were without au-

thority to bind the vessel for the supplies ordered by them, respectively.

III.

The charter-party by requiring the charterer to hold the owner harmless from liens upon the vessel, does NOT, as Judge Dooling suggests it does, concede to the charterer the authority to bind the vessel for the supplies furnished by libelant.

IV.

Even if it could be held that the terms of the charter-party when read literally, fail to deprive the charterer of authority to bind the vessel, yet the terms upon which the vessel was in fact held, as evidenced by Mr. Sooy's letter to Mills, the charterer's agent, and his acquiescence, and the acquiescence of the charterer, himself, therein, deprived the charterer of authority to bind the vessel; particularly in view of the fact that a charter-party may be oral, and the further fact that the libelant was notified that the vessel was under charter and would not be liable.

I.

THE TERMS OF A CHARTER-PARTY OR AGREEMENT FOR THE SALE OF A VESSEL ARE NOT, AS JUDGE DOOLING SUGGESTS THEY ARE, THE EXCLUSIVE SOURCE OF A CHARTERER'S INABILITY TO CREATE LIENS UPON THE VESSEL.

The statute (Act of June 23, 1910) specifically provides that there shall be no lien if the furnisher knew or could have ascertained by the exercise of reasonable diligence that *for any reason*, the person ordering the supplies had no authority to bind the vessel therefor. The furnisher in the instant case, had been warned that the owner and the charterer

had agreed, either by the terms of the written charter-party or by some other contract, that the vessel should not be held. Before he furnished the goods he had been informed of this fact by the owner (Apostles 72), the charterer (Apostles 36-37) and the charterer's agent (Apostles 95, 97). As the trial court found:—

“So that if the owners, after the delivery of the ship to the charterers, had any power to prevent the attaching of a lien for supplies by warning the libelant not to furnish such supplies on the credit of the ship, such warning was clearly and definitely given.”

The merchant did not depend upon what the learned trial Judge found to be a defect in the charter-party; because the merchant never saw the charter-party or requested to see it (Apostles pp. 44-45). All he knew was what he had been told by the owner, the charterer and the charterer's agent; viz, that the charterer and not the vessel would be liable for the provisions.

The learned Judge failed, we respectfully submit, to accord the necessary or for that matter, any consideration to the words “*or for any other reason*” found in the statute.

The statute specifically provides that a furnisher of supplies shall have no lien if he knew or by the exercise of reasonable diligence could have ascertained that the person ordering the supplies was without authority to bind the vessel therefor; because:—

- (a) "of the terms of a charter-party",
- (b) of the terms of an "agreement for sale of the vessel, or"
- (c) "for any other reason".

(Act June 23, 1910, c. 373, 36 Stat. 604 (Comp. St. 1913, Sec. 7787).)

Notwithstanding the words "*or for any other reason*", appearing in the statute, the learned District Judge limited the application of the statute to the terms of the charter-party. This is obvious from the following excerpt from the court's opinion:—

"And while the owners took every precaution to warn the furnisher of the supplies not to have any of them go on the ship's account, they did not take the essential and fundamental precaution to provide by the terms of the charter that the charterer, or the master appointed by him, should be without authority to bind the vessel therefor."

In our assignment of errors, we specified particularly that the court erred in this interpretation of the statute.

We submit that the effect of the interpretation is to eliminate from the operation of the statute, cases which the Congress, by the use of definite words, included in the operation of the statute. We will proceed now to notice some of those cases:

We have already referred at length to *The Underwriter*.

In *The Valencia*, 165 U. S. 264, it was held:

"A maritime lien on a vessel is not created by supplying coal to it on the order of a charterer,

without any order or procurement of the master or his expressed consent, where the charterer was required by the charter to provide and pay for the coal, and had an office at the port of supply so that the party providing it could easily have ascertained the ownership of the vessel and the relation of the charterer to it, although he acted in fact on a belief that the vessel was responsible.”

What does one see when he reflects the light of that decision upon the facts of the present case? In each, the charterer was required to pay for the supplies. In each, the charter-party failed to specifically provide that the charterer should have no power to permit liens to attach. In each, the merchant knew the owners. In each, the merchant could have discovered the precise terms of the charter-party (in fact the merchant was informed of them in the instant case). In each, the merchant looked to the vessel.

There is, of course, this difference in the two cases. In *The Valencia*, the supplies were ordered by the charterer himself, whereas in the instant case the supplies were ordered by the master (except in the case of the items aggregating \$361.38, evidenced by libelant's "Exhibit 6", which were ordered by Mr. Mills (Apostles pp. 26-27) the charterer's agent (Apostles p. 96).

But this difference does not affect the point which we now urge; namely, that specific provisions in the charter-party, forbidding the charterer to bind the vessel, are not the exclusive criteria; that even

though a charter-party be silent upon the subject of liens, yet a charterer can not bind the vessel for goods ordered by him if the charter-party required him to furnish the supplies, and the furnisher had notice thereof.

Thus we have found one illustration of the “*any other reason*” which the Congress had in mind and which, we respectfully submit, the learned District Judge ignored.

And in this connection has there not been a breach of a well recognized canon of statutory construction? It would seem so from a consideration of the decision of Judge Dooling, himself, wherein, in interpreting the Act of 1910, he said in *The Sinaloa*, 209 Fed. 287, 288:—

“The apparent intent of the act was to relieve those persons who formerly would have had a lien if credit had been given to the vessel from the necessity of alleging and proving that credit had been so given. *The purpose does not seem to have been to create a new class of liens, or liens for services which had been theretofore determined not to be maritime, but only to deal with certain matters that had always been recognized as cognizable in admiralty.*”

A similar conclusion follows a consideration of the Act of 1910 in *The Dredge A.*, 217 Fed. 617, 628-9, in which the court said:—

“This is in accordance with well settled canons of statutory construction by which courts are guided in ascertaining the intention of the legislature. ‘The presumption is that the legislature does not intend to change or modify the

law beyond what it declares in express terms, or by unmistakable implication'. 26 Am. & Eng. Enc. 649.

Mr. Justice Strong in *Shaw v. Railroad Company*, 101 U. S. 557, says:

'No statute is to be construed as altering the common law further than its words import. It is not to be construed as making an innovation upon the common law which it does not fairly express.' "

In *The Yankee*, 233 Fed. 919, 925-6, the Circuit Court of Appeals for the Third Circuit said:—

"But it is contended by the claimant, that even if it should be found that actual deliveries had been made to the vessel they were made upon orders of the charterer under circumstances which destroyed the statutory presumption of its authority. Unquestionably the presumption of the statute may be removed and the right to a lien based upon it destroyed by affirmative proof which actually displaces it. *The Patapsco*, 80 U. S. (13 Wall) 329, 20 L. Ed. 696. This the statute contemplates by prescribing that no lien is conferred 'when the furnisher knew or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter-party, agreement for sale of the vessel, or for any other reason, a person ordering repairs, supplies or other necessities, was without authority to bind the vessel therefor.' *This proviso is nothing more than a statutory declaration of a principle long recognized in maritime jurisprudence and repeatedly announced by the Supreme Court of the United States.* *The Kate*, 164 U. S. 458; *The Valencia*, 165 U. S. 264. It is in effect that no lien shall be afforded and no presumption given in aid of a materialman who furnishes supplies under circumstances which put him

on inquiry as to the authority of the one giving the order to bind the vessel. That is, no one with knowledge that supplies are ordered by one without authority to pledge the vessel, or no one awake to circumstances which suggest inquiry as to that authority, may shut his eyes to what he sees or to what he could see by looking, and avail himself of the remedies or the presumptions of the law."

Beyond the error which we submit resulted from a failure to so interpret the statute that no change should be deemed to have been worked except the change expressly declared, it seems to us that the interpretation placed upon the statute by the learned trial Judge is peculiarly unwarranted, in view of the fact that his interpretation unnecessarily *extends* a class of liens which are disesteemed because of their secret nature.

In *Pratt v. Reed*, 19 How. 359, 361, it was said:

"These maritime liens in the coasting business and in the business upon the lakes and rivers are greatly increasing; and, as they are tacit and secret, are not to be encouraged, but should be strictly limited to the necessities of commerce which created them. Any relaxation of the law in this respect will tend to perplex and embarrass business, rather than furnish facilities to carry it forward."

Mr. Justice Bradley in delivering the opinion of the court in *The Lottawanna*, 21 Wall. 558, said:—

"It may be added that the existence of secret liens is not in accord with the spirit of our commercial usages."

Judge Sanborn in *The Aurora*, 194 Fed. 559, said:

“A maritime lien is a privileged one, secret in character overriding all other liens or transfers, possibly operating to the prejudice of creditors or purchasers without notice. In the nature of things it is *stricti juris*, and must be shown to exist”.

Judge Hale in *The James T. Furber*, 157 Fed. 126, 129, said:

“It is the general principle of the maritime law that an admiralty lien is to be construed *stricti juris*, and cannot be extended by construction, analogy or inference.”

See also:—

The Yankee Blade, 19 How. 82;

The Dixie, 236 Fed. 607, 608;

The Dredge A., 217 Fed. 617, 629;

Taylor v. Weir, 110 Fed. 1005;

The Havana, 87 Fed. 487, 488.

Besides the character of cases indicated by *The Underwriter* (supra) and *The Valencia* (supra), there are many others which fall within the description “for any other reason”, adopted by the Congress in the Act of 1910, and in which it must be held under the rules of statutory construction, the Congress intended no lien could attach to a ship for supplies furnished to it. One of these is the case in which there is BAD FAITH on the part of the furnisher of the supplies. Such a case is *The Kate*, 164 U. S. 463, in which it is said (pp. 463-465, 471):—

“We are of opinion that, as the libelant knew, or under the circumstances, is to be charged with knowledge, that the charter party under which The Kate was operated, obliged the charterer to provide and pay for all the coal needed by that vessel, no lien can be asserted under the maritime law for the value of coal supplied under the order of the charterer, even if it be assumed that the libelant in fact furnished the coal upon the credit both of the charterer and of the vessel. As the charterer had agreed to provide and pay for all coal used by the vessel, he had no authority to bind the vessel for supplies furnished to it. His want of authority to charge the vessel for such an expense was known or could have been known to the libelant by the exercise of due diligence on its part. Under the circumstances, the libelant was not entitled to deliver the coal on the credit of the vessel, and its attempt to hold the vessel liable is in *bad faith* to the owner. The law cannot approve or encourage such an attempt to wrong the owners of the vessel. Neither reason nor public policy forbade the owner and the charterer from making the arrangement evidenced by the charter party of December 15, 1892. The master of a ship is regarded as ‘the confidential servant or agent of the owners, and they are bound to the performance of all lawful contracts made by him, relative to the usual employment of the ship, and the repairs and other necessities furnished for her use. This rule is established as well upon the implied assent of the owners as with a view to the convenience of the commercial world’. The Aurora, 1 Wheat 96, 101. ‘The vessel must get on,’ and ‘the necessities of commerce require that when remote from the owner, he (the master) should be able to subject his owner’s property to that liability, without which, it is reasonable to suppose, he will

not be able to pursue his owner's interests'. The *St. Jago de Cuba*, 9 Wheat, 409, 416; *The J. E. Rumbell*, 148 U. S. 1. When, therefore, supplies are furnished to a vessel in a foreign port, upon the order of the master, nothing else appearing, the presumption is that they were furnished on the credit of the vessel and of the owners, and an implied lien is given. *But no such necessity can be suggested, and no such reason urged, in support of an implied lien for supplies furnished to a charterer, when the libellant at the time knew, or by such diligence as good faith required could have ascertained, that the party upon whose order they were furnished was without authority from the owner to obtain supplies on the credit of the vessel, but had undertaken, as between itself and the owner, to provide and pay for all supplies required by the vessel.*

There are many cases in which the recognition or rejection of liens under the maritime law has depended upon the diligence of parties in ascertaining the limitations imposed by the owners of vessels upon the authority of masters. *These cases proceed upon the ground that good faith must have been exercised by the party seeking to enforce a lien upon the vessel.* As they throw light upon the present inquiry, it is proper to refer to some of them.

In *Thomas v. Osborn*, 19 How. 22, 31, 32, the court said that all the commentators agree 'that if one lend money to a master, knowing he has not need to borrow, he does not act in good faith, and the loan does not oblige the owner. Valin, art. 19, Emerigon, *Contrat a la Grope*, chap. 4, Sec. 8, and the older commentators cited by him. Boulay-Paty, *Cours de Droit Com.* tit. 1, Sec. 2; Boulay-Paty, *Cours de Droit Com.* tit. 4, Sec. 14; and see the authorities cited by him in note 1, page 153 * * * 'If,' the court said, 'the master has funds of his

own which he ought to apply to purchase the supplies which he is bound by the contract of hiring to furnish himself, and if he has funds of the owners which he ought to apply to pay for the repairs, then no case of actual necessity to have a credit exists. *And if the lender knows these facts, or has the means, by the use of due diligence, to ascertain them, then no case of apparent necessity exists to have a credit, and the act of the master in procuring a credit does not bind the interest of the general owners in the vessel*. In the same case it was said: 'We are of opinion Loring & Co. (merchants who had given a credit to Leach, to whom had been committed the entire possession, command, and navigation of the vessel) had no right to lend Leach money or furnish him with supplies on the credit of the ship, and cannot be taken to have done so. Our opinion is, that inasmuch as the freight money earned by the vessel was sufficient to pay for all the needful repairs and supplies, and might have been commanded for that use, if they had not been wrongfully diverted, no case of actual necessity to encumber the vessel existed; and as Loring & Co. not only knew this, but aided Leach to divert the freight money to other objects, they obtained no lien on the vessel for their advances'.

In *The Grapeshot v. Wallerstein*, 9 Wall. 129, 136, the court, observing that courts of admiralty do not scrutinize narrowly the account against the ship, said: 'They will reject, undoubtedly, all unwarranted charges; but upon proof that the furnishing (of supplies and materials) was in good faith, on the order of the master, and really necessary, or honestly and reasonably believed by the furnisher to be necessary for the ship while lying in port, or to fit her for an intended voyage, the lien will be supported; unless it is made to appear affirmatively that the credit to the ship was un-

necessary, either by reason of the master having funds in his possession applicable to the expenses incurred, or credit of his own or of his owners, upon which funds could be raised by the use of reasonable diligence; and that the materialman knew, or could, by proper inquiry, have readily informed himself of the facts'.

So, in *Hazlehurst v. The Lulu*, 10 Wall. 192, 201-204, the court said: 'Good faith is undoubtedly required of a party seeking to enforce a lien against a vessel for such a claim (for advances to the master, or for repairs or supplies furnished at his request) but the fact that the master had funds which he ought to have applied to that object is no evidence to establish the charge of bad faith in such a case unless it appears that the libellant knew that fact, or that such facts and circumstances were known to him as were sufficient to put him upon inquiry within the principles of law already explained. Express knowledge of the fact that the master had sufficient funds for the purpose is not necessary to maintain the charge of bad faith, as it is well-settled law that a party to a transaction, where his rights are liable to be injuriously affected by notice, cannot willfully shut his eyes to the means of knowledge which he knows are at hand, and thereby escape the consequences which would flow from the notice if it had actually been received; or, in other words, the general rule is that knowledge of such facts and circumstances as are sufficient to put a party upon inquiry, and to show that if he had exercised due diligence he would have ascertained the truth of the case, is equivalent to actual notice of the matter in respect to which the inquiry ought to have been made.' Again: 'Viewed in any light, it is clear that necessity for credit must be presumed where it appears that the repairs and supplies were ordered by the master, and that they were necessary for the

ship when lying in port or to fit her for an intended voyage, unless it is shown that the master had funds, or that the owners had sufficient credit, and that the repairer, furnisher, or lender knew those facts or one of them, or that such facts and circumstances were known to them as were sufficient to put them upon inquiry, and to show that if they had used due diligence they would have ascertained that the master was not authorized to obtain any such relief on the credit of the vessel.'

In *The Emily Souder v. Prichard*, 17 Wall. 666, 671, the court said that the presumption of law in the absence of fraud or collusion, where advances are made to a captain in a foreign port, upon his request, to pay for necessary repairs or supplies to enable his vessel to prosecute her voyage, or to pay harbor dues, or for pilotage, towage and like services rendered to the vessel, that they are made upon the credit of the vessel as well as upon that of her owners, 'can be repelled only by clear and satisfactory proof that the master was in possession of funds applicable to the expenses or of a credit of his own or of the owners of his vessel, upon which funds could be raised by the exercise of reasonable diligence, and that the possession of such funds or credit was known to the party making the advances, or could readily have been ascertained by proper inquiry'.

In *The Sarah Starr*, 1 Sprague, 453, 455, the court said that 'in giving credit to the vessel and owners, the materialman should act in good faith, and he would not be deemed to act in good faith if he knew that the master had funds wherewith to pay for the supplies, or, if facts were known to him which would create suspicion and put him upon inquiry, when such inquiry would have lead to the knowledge that the master had funds, and had no right, therefore, to obtain supplies on credit. That

is, if the materialman had knowledge that the master was acting in bad faith towards his employers, or knew of circumstances which ought to admonish him to make inquiry that would have lead to such knowledge, then he would be affected with bad faith, as colluding with the master, and aiding him in violating his duty to his owner. But if the materialman had no reason to suppose that the master was violating his duty in obtaining a credit, he might, upon request of the master, trust to the vessel and owners, and a lien would thereby be created'.

The principle would seem to be firmly established that when it is sought to create a lien upon a vessel for supplies furnished upon the order of the master, the libel will be dismissed if it satisfactorily appears that the libellant knew, or ought reasonably to be charged with knowledge, that there was no necessity for obtaining the supplies, or, if they were ordered on the credit of the vessel, that the master had, at the time, in his hands, funds which his duty required and he should apply in the purchase of needed supplies. Courts of admiralty will not recognize and enforce a lien upon a vessel when the transaction upon which the claim rests originated in the fraud of the master upon the owner, or in some breach of the master's duty to the owner, of which the libellant had knowledge, or in respect of which he closed his eyes, without inquiry as to the facts.

If no lien exists under the maritime law, when supplies are furnished to a vessel upon the order of the master, under circumstances charging the party furnishing them with knowledge that the master cannot rightfully, as against the owner, pledge the credit of the vessel for such supplies, much less one is recognized under that law where the supplies are furnished, not upon the order of the master, but upon that of the charterer who did not represent

the owner in the business of the vessel, but who, as the claimant knew or by reasonable diligence could have ascertained, had agreed himself to provide and pay for such supplies, and could not, therefore, rightfully pledge the credit of the vessel for them.

* * * * *

If the libellant in this case had furnished the coal upon the order of the master, and without knowledge or notice that the vessel was operated under a charter party, or if coal had been furnished upon the order of the charterers as well as upon the credit of the vessel, under circumstances which did not charge libellant with knowledge of the terms of the charter party, but charged it only with knowledge of the facts that the vessel was being operated under a charter party, a different question would be presented."

The part which the decision in *The Kate* (supra), plays in the solution of the present problem cannot be better illustrated than by the following observations concerning the Act of 1910, found in the opinion in *The Oceana*, 233 Fed. 139, 146:

"The act does not mean that the furnisher shall not have the right to rely upon the authority to bind the vessel presumed to exist in the officers and agents specified in the second section. It is only when he knows that such officers or agents do not have the requisite authority, or under the circumstances is put upon inquiry as to their power, that the presumption becomes inoperative. There must be an actual restriction of authority by the owner in the first place, and in the absence of affirmative knowledge of such restriction, or of circumstances which ought to raise a doubt in his

mind, the furnisher is entitled to rely upon the presumption and will acquire a lien, even if the officer or agent in fact has no authority. *The phrase 'knew or by the exercise of reasonable diligence could have ascertained' was adopted from The Kate, 164 U. S. 170, and was used in the Act of Congress to make it clear that, if the furnisher know of the existence of a charter party or of an agreement for the sale of the vessel, he is put upon inquiry as to its terms, and cannot excuse himself by denying ignorance of the terms, should it turn out that the charterer or agreed purchaser had undertaken to furnish the vessel at his own cost.'*

See, also, *The Yankee*, 233 Fed. 919, 925-6.

Thus, we submit, that far from having altered the rule laid down in *The Underwriter* (supra), the Congress specifically recognized that rule and declared it to be an accurate statement of the law, by adopting the language of *The Kate* (supra); language upon which Judge Lowell largely based his conclusion in *The Underwriter*.

Returning, for a moment, to another illustration of the "bad faith" doctrine, we find the decision of Judge De Haven in *The H. C. Grady*, 87 Fed. 232, 233 et seq., where it is said:

"I think it sufficiently appears from the evidence that, under the agreement, the legal title of the steamer was not to be transferred until the payment of the balance due upon the contract of purchase; and it was also agreed that the purchasers were, at their own expense, to make such repairs and changes in the construction and equipment of the steamer as they might deem necessary, and were to permit no liens to be filed against her while in their possession,

and prior to the time when they should make final payment on account of the purchase price, and Messrs. Crocker & Brooks subsequently gave to said Strong a bond to secure performance of their agreement in this respect. Strong was a resident of Portland, Or., and, prior to her delivery to the purchasers under this agreement, the steamer was duly registered in the office of the collector of customs for that district, by the said Strong, as owner; and one James E. Denny was appointed by him as her master, *and he was instructed by Strong, in effect, to look after his interests, and see that no bills were incurred against the steamer until she was fully paid for.* Denny was also the agent of Crocker & Brooks, and acted for them in the negotiation concerning the purchase and delivery of the steamer. After Strong parted with her possession, under the agreement above stated, the steamer was brought to this state, and from the time of her arrival here until some time in September, 1897, was employed by Crocker & Brooks and others, who seem to have made some agreement with them for interests in the steamer, in carrying passengers and freight between San Francisco and different places on the Sacramento river; and, during the time while she was thus in the possession of Crocker & Brooks, supplies were furnished to the steamer by certain of the libelants; and materials furnished for her use, and repairs made upon her, and services rendered on board, by other libelants.

1. In my opinion, the contract between the intervenor, Strong, and Crocker & Brooks, and under which possession of the steamer was delivered to the latter, was a conditional sale.

* * * * *

2. The libels of the Black Diamond Coal-Mining Company, Meyer & Akmann, H. P. Christie, and C. J. Sbarbaro may be consid-

ered together. That of H. P. Christie is for materials furnished and used by him in making certain repairs upon the steamer, and for labor performed by him in making such repairs. The materials were furnished and repairs made at the request of Captain Denny, the master of the vessel. The remaining libels referred to are for supplies furnished. The evidence shows that the supplies were also furnished for the use of the steamer upon the order of Capt. Denny. Neither of the libelants made any inquiry in relation to the ownership of the steamer, or as to whether she was being operated by any person other than her owner.

It is claimed by the intervener, Strong, that, under these circumstances, the libelants are not entitled to enforce a lien against the steamer. I do not think this contention can be sustained. The person upon whose order the supplies were furnished, and repairs made, was the master of the steamer, duly appointed such by the said Strong, her registered legal owner. Strong, as before stated, was and is a resident of Portland, Or., and the supplies were furnished for the use of the steamer, and the repairs made upon her, in San Francisco. It is the rule of the general maritime law that the master, in the absence of the owner, has authority in a foreign port to bind his owners for necessary repairs and supplies. * * * When these supplies were furnished, and repairs made to the steamer H. C. Grady, her owner, Strong, was absent in Portland, Or., and the steamer was in a foreign port, within the meaning of the maritime rule just stated, as it is well settled that a port is deemed to be foreign to a vessel which is not in the state where she belongs, and where her owner resides.

* * * * *

There was nothing, in the facts or circumstances under which the master contracted with

either of the libelants, sufficient to suggest the slightest doubt of the actual authority of the master to order the supplies and repairs, and the libelants were therefore not required to make any inquiry as to his actual authority, but had a right to presume that he was clothed with the ordinary powers of a master, and that he was not acting in violation of instructions given him by his principal. The supplies and repairs were necessary, and therefore within the general authority of the master to procure.

* * * * *

In addition to what has been said in relation to the contracts under which the several claims of Whelan & Whelan and McMurphy & McAvoy arise, it is proper to state that said libelants supposed that the steamer was responsible for the work performed and materials furnished by them, and that they would have a lien upon her for the value of such work and materials; but neither of said libelants made any inquiry regarding the ownership of the steamer, or whether Crocker & Brooks had any right to pledge the credit of the steamer for the work and materials ordered by them. On August 6, 1897, when perhaps about one-half of their respective claims had accrued, Crocker & Brooks, as principals, and said libelants as sureties, executed a bond, whereby they became 'jointly and severally bound unto Fred R. Strong in the sum of one thousand dollars'.

* * * * *

The libelants were informed by the recitals contained in this bond that Strong was the owner of the steamer, and that Messrs. Crocker & Brooks were in possession of, and were about to operate the steamer, under the contract to purchase; and if they were not directly informed by such recitals that the vendees were to permit no claim or lien to accrue against the steamer, while in their possession,

and until fully paid for by them, they were at least put upon inquiry as to the terms of such contract. The libelants, however, did not inquire as to the terms of the agreement, and, under such circumstances, there is a conclusive presumption that, if inquiry had been made, they would have been fully informed in relation thereto. They are therefore charged with knowledge of the fact that Crocker & Brooks were in possession of said steamer, under an agreement for its purchase, and by the terms of which they had further agreed with the intervener, Strong, that all alterations in, or repairs which they caused to be made to, such steamer, should be paid for by them, and that they were not to permit any liens to accrue against such steamer while it should be in their possession under that contract.

* * * * *

As before stated, some portion of the claim of Whelan & Whelan is for materials furnished and repairs made by them upon the order of the master; what portion, however, does not appear, nor whether such materials were furnished and repairs made before or after the execution of the bond above referred to. If before, it was incumbent upon the libelants to prove the fact, and the value of such materials furnished and repairs made; *and if after its execution their claim therefor must be held to be subordinate* to that of the intervener, Strong, because, as we have seen, they were charged, by the recitals of the bond, with notice of the terms of the contract under which Strong had parted with the possession of the steamer, and such contract was sufficient to put the libelants upon inquiry as to the authority of the master to bind the steamer for materials and repairs while in the possession of Crocker & Brooks, under their contract to purchase, and they made no such inquiry."

In *The Mary A. Tryon*, 93 Fed. 220, 221, Judge Brown said:

“*It is against conscience* that in a business like this towages for the charterer’s account, when the tower knows that the boats are chartered, should be imposed upon the owner without a previous understanding to that effect. Knowledge that the boat was chartered, and the necessary implication in such a business as this, that the charterer and not the owner should pay for towages, as well as Quigly’s testimony to the ordinary practice to collect of the charterers only, and the libelant’s dealing with Scott alone and not with any master of the boat, are sufficient to prevent the libelant’s recovery. The case is similar in principle to that of *The Kate*, 164 U. S. 458, where it was held that no lien would exist merely upon dealings with the charterer, even if the credit were given to both the charterer and to the vessel, because the charterer had no authority to bind the vessel. In this regard I do not think towages in the usual course of the charterer’s business, and not arising in any exceptional emergency, stand in any better position than repairs and supplies. The same rule was reaffirmed still more pointedly in *The Valencia*, 165 U. S. 264, where the supply men had no express knowledge of any charter but had knowledge of facts sufficient to put them on inquiry.”

In *The City of Milford*, 199 Federal Reporter, 956, 959-60, it was said:

“The general purpose of this enactment is plain. Hereafter when supplies are furnished for a ship to one lawfully having the management of the ship, the presumption is that the ship is liable for them. If the materialman knows nothing about the authority of the person in possession of the ship, except that he

visably has the management of it, he may furnish the supplies, and the ship will be bound for them. But he may know something more. He may have knowledge that the person intrusted with the management of the ship has, by agreement with the real owner of the ship, no right to subject it to liens. If, under such circumstances, a materialman furnishes supplies, he cannot hold the ship. If he could, he would profit by his own wrong. Even when he does not know certainly that the person having the management of the ship has no authority to bind it, he may have learned such facts or circumstances as will suggest to him the probability that such may be the case. If so, he may not shut his eyes and his ears to further inquiry. He cannot say:

‘I admit that I heard something which, if true, indicated that the person who was ordering the supplies had no right to bind the ship for them; but I did not know whether that which I had heard was true or not. I could easily have made inquiries, and, if I had inquired, I would have found out the truth, but I did not do so.’

He who is so careless of other men’s rights will find that his own will be determined, not by what he absolutely knew, but by what it was in his power to find out, if he had acted with ordinary and reasonable care. And so the act provides that nothing in it shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of the charter party, or agreement for sale of the vessel or for any other reason, the person ordering the repairs, supplies or other necessities was without authority to bind the vessel therefor.

Before this proviso can have any application, something must have occurred to put the fur-

nisher of the supplies upon inquiry. The proviso is a proviso. It is to be understood in such sense as will harmonize it with the general purpose of the act. That purpose was to make the management of the vessel at its port of supply presumptive evidence of the right to bind it for supplies there furnished. That purpose prevails unless it shall be shown that the person so managing the vessel was unlawfully or tortiously in possession or charge of it, or unless something has been brought to the knowledge or attention of the person furnishing the supplies which in honesty and good conscience puts upon him the duty of inquiry as to whether the person who has the management of the ship has the right to pledge its credit.

* * * * *

It is neither necessary nor appropriate to attempt to suggest what circumstances will be sufficient to put a supply man upon inquiry. In this case it is not contended that there were any. Moreover, the agent of the claimant was on the vessel, knew that all these supplies were being furnished to it, himself ordered an appreciable portion of them, and did nothing to warn those who were supplying them that the ship was not to be bound for them."

Is there any distinction between the instant case and the authorities we have cited? We submit that Rudbach did not act in good faith when he decided in his own mind that he would hold the ship for supplies which he had been told he would need sell, if at all, upon the credit of the charterers. He was not compelled to sell his goods. He did sell them, and for some he was paid by the charterer. He has a claim against the

charterer for the balance. He has no just claim against the ship. He was warned before he parted with any of his goods. After failing to collect from the charterer, he is acting in bad faith in attempting to hold the ship.

In presenting our second point, we shall refer the court to additional authorities in support of the proposition that the terms of a charter-party are *not* the exclusive source of a charterer's inability to create liens upon the vessel.

II.

BY THE TERMS OF THE CHARTER-PARTY IN THE INSTANT CASE, AND BY VIRTUE OF THE NOTICE WHICH THE TRIAL JUDGE FOUND WAS GIVEN LIBELANT, THE CHARTERER AND HIS MASTERS AND HIS AGENT, MR. MILLS (Apostles, p. 27), WERE WITHOUT AUTHORITY TO BIND THE VESSEL FOR THE SUPPLIES ORDERED BY THEM RESPECTIVELY.

This conclusion follows from the construction which the parties themselves put upon the contract, and from the fact that they promptly notified the libelant of that construction, and from the fact that the libelant never saw or sought to see the charter-party and had no knowledge of its terms, except the knowledge acquired from the statements made to him by the owner, the charterer and his agent.

This conclusion follows furthermore from a consideration of the law as it stood when the statute was enacted. The law then declared that if a

charterer be required to provision the ship, and the materialman knows or ought to know that fact, then the ship shall not be liable. As Judge Brown said in *The Sarah Cullen*, 45 Fed. 511, notice that a charterer was to pay for services is "equivalent to notice that the vessel was not to pay it". The Congress did not alter this law. It merely required the materialman to be protected if innocent; but if notified, it required him to pursue that notice, perhaps to call for the charter-party and to determine therefrom whether the owner or charterer was required to furnish the supplies. The law never contemplated that there should be used the precise words "the charterer cannot bind the ship". That conclusion resulted as a fact from the circumstance that the charterer agreed by the charter-party to pay the bills.

That is the precise conclusion which Judge Lowell reached in *The Underwriter* (supra) when he decided that the language used in the charter-party constituted "a limitation on the authority of the captain" and not "merely a contract made by the charterer with the owner that the former will pay for supplies in the first instance, and, in case this is not done for any reason, will reimburse the owner for supplies paid for by the latter".

And the same conclusion was reached by Judge Morton when in 1915, he decided that a materialman occupying even a more favorable position than that occupied by Rudbach in this case, was not entitled to a lien (*The Francis J. O'Hara, Jr.*

229 Fed. 312). In the present case the materialman was warned. In the *O'Hara* case he was bound by facts which he would have known if he had made inquiry. We quote from the opinion as follows:

“It is not contended that under the general admiralty law a lien would attach for this salt. The lien claimed arises, if at all, under the Act of June 23, 1910 (U. S. Comp. St. 1913, Sec. 7785), which provides in substance that any person furnishing supplies to a vessel shall be entitled to a lien, and that the master shall be presumed to have authority from the owners to secure supplies for the vessel. It further provides (section 3) that nothing in the Act shall be construed to create a lien when the furnisher, by the exercise of reasonable diligence, could have ascertained that the person ordering the supplies was without authority to bind the vessel therefor. The salt was ordered by the master of the vessel. He was in fact without authority to bind the vessel therefor. *Rich v. Jordan*, 164 Mass. 127; 41 N. E. 56.

The real question is whether, upon the agreed facts, the intervening petitioner could, ‘by the exercise of reasonable diligence’, have ascertained the master’s lack of authority. The petitioner knew that the vessel was being sailed on a lay; it knew that on some lays the vessel would be liable for the salt, and that on others she would not. It made no inquiry whatever, either from the master or the managing owners, though it might easily have done so, as to what lay she was being operated under, and it had no information on the subject from other sources. It is not stated in the agreed facts that the master, if inquired of, would not have told the truth. On several previous occasions salt had been furnished by the petitioner to the vessel when she was on the one-

half lay, and was therefore liable for it, and it had been paid for by the owners. The last time before that here in question was more than two years previous, in May, 1909; and there had not been thereafter anything equivalent to a continuous course of dealing between the vessel and the petitioner, from which authority to buy supplies on her account might be inferred. There was no actual or constructive representation that the vessel was on the half lay or was liable for supplies when this salt was purchased.

The case is not like *The City of Milford* (D. C.), 199 Fed. 956, where the libelants acted on information which they supposed reliable, and were held to have been justified in so doing, though the information turned out to be false. It is said in the opinion in that case: 'I am persuaded that those witnesses who have testified that he (the president of the company which was the agreed purchaser of the vessel) and the other agents of the company led them (the lienors) to believe that it was the owner of the ship have testified truthfully and accurately.' Rose, District Judge, *The City of Milford* (D. C.) *ubi supra*, 199 Fed. at 958.

Here the petitioner had no reason to suppose that the vessel was being sailed under a lay which made her liable for supplies, nor that the master had authority to pledge her credit therefor. It furnished the salt without making any effort to find out as to those important facts.

It seems to me that the petitioner, knowing that the vessel was on a lay, was bound to inquire whether that lay was one under which she, or the master and crew, were to pay for the salt. *The Eureka* (D. C. Cal.) 209 Fed. 373. The slightest inquiry would have disclosed that the master had no authority to buy it on the vessel's account."

The conclusion reached in these two cases (*The Underwriter* and *The Francis J. O'Hara Jr.*), the one decided before the statute of 1910, the other after, indicates fairly, we submit, that if a charterer be bound to furnish supplies to the ship and that that fact be known, actually or constructively, to a materialman, then the ship shall not be subject to a lien for the supplies, even though the charter-party did not in precise words provide "the charterer cannot bind the ship".

This proposition would seem particularly to follow, if one apply the rule announced in *The Surprise*, that even though the charter-party be silent upon the point, the charterer must provide supplies for the chartered vessel and *protect her from liens*. The court there said (129 Fed. 873, 877-8):

"We should also observe that much has been made of the fact that in *The Kate* and *The Valencia*, there were formal charter parties which expressly provided that each charterer should disburse the vessel for ordinary current expenses, and protect her from all liens on account thereof. There seems to be an impression that there was something in this fact of special importance; and it has apparently appealed to the legal imagination. It was, however, absolutely immaterial, because, on every charter of the hull of a vessel, the substantial relations of the parties are the same as those specially provided in *The Kate* and *The Valencia*. The charter (charterer) is bound to disburse the vessel and *protect her from liens*, and impliedly agrees to do so, an agreement as effectual in law as an express one. Moreover, so far as concerns knowledge on the part of a merchant of a charter party

or its terms, or the duty arising on a merchant to inquire, there is no essential distinction; because, if a merchant knows that the hull is chartered, though orally and informally, he knows as a matter of course, and must be held to know, that the usual obligations pro and con exist; and he could know no more if the whole was expressed in a formal instrument. We emphasize this fact because all the decisions we will hereafter cite relating to vessels where the hull was chartered, bear on *The Kate* and *The Valencia*, regardless of the fact whether there was a formal charter or only an oral one without any express statement of the terms thereof."

However, in considering the effect of the decision in *The Surprise*, it is but fair to bear in mind that the supplies considered therein were "hand to mouth necessities". This appears at once from *The New Brunswick*, 129 Fed. 893, where the court said:

"The petitioner undertakes to bring this appeal within *The Surprise* (decided by us on March 29, 1904) 129, Fed. 873, and *The Philadelphia*, 75 Fed. 684, 686, 21 C. C. A. 501, also decided by us. This he fails to do. In each of these cases, hand to mouth supplies were furnished at intermediate ports on the orders of the master, or under such circumstances that they were presumed to be by his orders. Certainly there is nothing in this record to enable us to frame a judgment for any portion of the coal in issue as having been thus ordered.."

In *The J. Doherty*, 207 Fed. 997, the court considered the power of one who had rendered a towage service to a vessel which he knew to be under charter, to assert a lien upon the vessel. After

deciding that the towage was not a necessary within the meaning of the act, the court proceeded to state (p. 1001):

“In short, for towage services rendered in the exigencies of navigation there is at least a presumptive lien upon the boat. Whether such presumption arises, or whether the lien exists, depends upon the circumstances under which the services are rendered. If it appear that the services were not rendered upon the credit of the boat, or *that the surrounding circumstances were such as to apprise the tower that they were not to be so rendered, then no lien exists.* The *Kate*, 164 U. S. 458; The *Valencia*, 165 U. S. 264.

In the light of these principles, the case at bar presents no difficulty. The effect of the charter was to give the charterer entire control of the movements and navigation of the boat, and the fact that the owner paid the man in charge is not sufficient to prevent the charter from being a demise of the boat. *Monk v. Cornell Steamboat Co.*, 198 Fed. 472, 117 C. C. A. 232. The fact that the charter was oral, without any express statement of the terms thereof, is immaterial. By an implied agreement, as effectual in law as if it were expressed, the *charterer is bound to disburse the vessel and to protect her from liens.* Moreover, so far as knowledge of the charter party on the part of the libellant is concerned, or his duty to inquire, there is no essential distinction, for if the libellant knows that the vessel is chartered, though orally and informally, he must be held to know, as a matter of course, that the usual obligations exist. The *Surprise*, 129 Fed. 873, 64 C. C. A. 309. *It is quite possible that the libellant believed that it had a lien, no matter who was relied upon to pay. But this was not*

giving credit to the vessel. The *Samuel Marshall*, 54 Fed. 398, 4 C. C. A. 385. *Nor was its method of charging the items.* *McCaldin v. The Stroma*, 53 Fed. 281, 3 C. C. A. 530. Knowledge that the boat was chartered, and the necessary implication in such a business as this that the charterer should pay for towage, as well as the course of dealing directly with the charterers, and the testimony of the libellant's clerk Oliver as to the usual practice of collecting from charterers are sufficient to prevent a recovery by the libellant." (Citing cases.)

Finally, upon this point we submit the following proposition and authorities therefor:

Supplies furnished a chartered vessel when she is not in distress or in such a position that the supplies availed the owner as well as the charterer, cannot constitute the basis of a lien, if the vessel were held under a charter-party which required the charterer to furnish the supplies and the furnisher knew the facts or by the exercise of reasonable diligence could have ascertained them. And this is so even though the supplies were furnished at the instance of the master.

The Columbus, 5 Sawy. 487; Fed. Cas. 3044;

The William Cook, 12 Fed. 919;

The S. M. Whipple, 14 Fed. 354;

The Ellen Holgate, 30 Fed. 125;

The Cumberland, 30 Fed. 449;

The Sarah Cullen, 45 Fed. 511;

The Samuel Marshall, 49 Fed. 754;

The Burton, 84 Fed. 998, 999;

The Tillie A., 84 Fed. 684, 685;

The H. C. Grady, 87 Fed. 232;

The Algonquin, 88 Fed. 318, 319;

The North Pacific, 100 Fed. 490;
The Underwriter, 119 Fed. 713;
The O. H. Vessels, 183 Fed. 561, 562-3;
The City of Milford, 199 Fed. 956, 959-960;
The J. Doherty, 207 Fed. 997, 1001;
The Francis J. O'Hara Jr., 229 Fed. 312;
The Kate, 164 U. S. 458.

This brings us to our third proposition.

III.

THE CHARTER-PARTY BY REQUIRING THE CHARTERER TO HOLD THE OWNER HARMLESS FROM LIENS UPON THE VESSEL, DOES NOT, AS JUDGE DOOLING SUGGESTS IT DOES, CONCEDE TO THE CHARTERER THE AUTHORITY TO BIND THE VESSEL FOR THE SUPPLIES FURNISHED BY LIBELANT.

Obviously, this requirement was inserted in the charter-party to protect the owner, not a stranger. Particularly not a stranger who, like Rudbach, never *saw* the charter-party or in anywise depended upon it. It seems to us perfectly patent that the requirement was inserted as a result of the fact that the owner demanded protection against a stranger; a stranger, such as the one in this case, who, in bad faith, might seek a lien upon the vessel.

The precise point was considered and decided by the Circuit Court of Appeals of the Seventh Circuit in *Northwestern Fuel Co. v. Dunkley-Williams Co.*, 174 Fed. 121, and in that case the court said (p. 124):

“The attempt to construe the language of the charter-party so as to give libelant the benefit of the clause prohibiting liens to accumulate in excess of \$1000 we deem without merit. Appellee was entitled under the agreement to receive the Poteskey free of all liens. The \$1000 clause served its mission when it placed it within the power of appellee to enforce the forfeiture clause. It was evidently placed in the charter-party for the benefit of the appellee, and not for the solace of those furnishing supplies without reasonable investigation as to responsibility. It is difficult to understand how an owner could protect himself against parties furnishing supplies without using due diligence to ascertain the facts, unless it be required that he do as appellant suggests: Paint a notice upon the vessel—a method which does not commend itself to our judgment. This opinion is not at variance with that of Judge Putnam in the case of *The Surprise*, 129 Fed. 873, 64 C. C. A. 309, since here we find that libelant was put upon notice of the charter party.”

And upon the trial of the cause, the District Judge said (pp. 126, 127):

“A persuasive argument is made by libelant as to the construction and effect of the peculiar clause in the charter-party—‘and shall not permit her to be in debt for amounts constituting a lien upon her for more than the sum of one thousand dollars at any time.’ It is contended that if the libelant, being put upon inquiry, had examined the charter-party, he would have been justified in construing this clause forbidding the charterer to incur liens exceeding \$1000 in amount as an implied consent to liens up to that amount, and that, as there is no evidence that any liens had accrued up to the time this coal was furnished,

it could not be held a fraud upon the owners to rely upon the security of the vessel within the limits thus fixed by the owners. This argument is specious, but not sound. The clause in question was inserted for the protection of the owner as against the charterer. It required the payment of claims by the charterer before they exceeded the limit. It is calculated to enforce the duty imposed by the antecedent clause. It was not inserted for the benefit of third parties as a foundation of a claim upon the vessel. The real question for the furnisher to determine primarily was who was bound to pay the coal bills. This question is effectually set at rest by the language of the seventh article of the charter-party: 'That for and during the life of this charter-party, the said party of the second part (the charterer) shall promptly pay all of the running and operating expenses of said steamer'. On learning of this obligation on the part of the charterer, the duty of the libellant was plainly to deal with the charterer, and by that course only could it keep faith with the owners."

In *The Surprise* (supra) the court indicates that the way in which an owner should protect himself against a lien is the very way which the trial judge held in this case results in subjecting the ship to the lien. In *The Surprise* the court said (p. 880):

"If, in these respects, there is any violation of any agreement, express or implied, between owners and charterers, the owners must protect themselves, as was done in the case at bar, by taking an obligation with a surety, or by terminating the charter for a breach of the terms thereof."

In *The City of Milford*, 199 Fed. 956, the charterer was required, as in the instant case, to hold the owner harmless from liens against the vessel. In fact, the charterer was required to give a bond conditioned to protect the claimant by reason of liens or other claims against the ship arising through or under the charterer. Yet this was not said to indicate that the charterer had authority to bind the vessel. The court decided that a lien would prevail because no notice of the terms of the charter-party was brought even constructively to the libellant.

And in *The Golden Rod*, 151 Fed. 6, the lien was not allowed, notwithstanding that the charterer had "engaged to furnish a bond to protect against any liens for seamen's wages, repairs, supplies, etc."

Finally, upon this proposition we submit that the particular provision of the charter-party from which the learned District Judge drew his inference, should be deemed to refer to such liens as those for seamen's wages, for which a vessel would be responsible irrespective of the agreements of the owner and charterer (*The Gen. J. A. Dumont*, 158 Fed. 312, 314).

Our fourth proposition we have already stated as follows:

IV.

EVEN IF IT COULD BE HELD THAT THE TERMS OF THE CHARTER-PARTY WHEN READ LITERALLY, FAIL TO DEPRIVE THE CHARTERER OF AUTHORITY TO BIND THE VESSEL, YET THE TERMS UPON WHICH THE VESSEL WAS IN FACT HELD, AS EVIDENCED BY MR. SOOY'S LETTER TO MILLS, THE CHARTERER'S AGENT, AND HIS ACQUIESCENCE AND THE ACQUIESCENCE OF THE CHARTERER, HIMSELF, THEREIN, DEPRIVED THE CHARTERER OF AUTHORITY TO BIND THE VESSEL; PARTICULARLY IN VIEW OF THE FACT THAT A CHARTER-PARTY MAY BE ORAL, AND THE FURTHER FACT THAT THE LIBELANT WAS NOTIFIED THAT THE VESSEL WAS UNDER CHARTER AND WOULD NOT BE LIABLE.

There is no doubt that Mills was the agent of Levick, the charterer. We submit his testimony on that point (particularly page 96 of Apostles).

“Q. After Levick appeared upon the scene of action did you act at all for Captain Roberts and Mr. Sooy in connection with the ‘South Coast’?”

A. No. I did not. You mean in any capacity whatever?

Q. In connection with the ‘South Coast’?

A. No, I did not.”

There is no doubt that Mr. Sooy wrote the letter to Mills which is set forth in the record (pp. 78-79):—

“June 26, 1915.

Mr. E. A. Mills

Pacific Wharf & Warehouse Co.

East San Pedro, Cal.

Dear Sir:

Under the provisions of charter and option given by the South Coast Steamship Co., the owners of the S. S. South Coast, to Mr. Levick,

the repairs now being made to this vessel are to be made for the credit of Mr. Levick and not upon the credit of the vessel. This is also true as to any supplies that may be furnished the vessel or on account of any labor furnished thereto. Carrying out the agreement with Mr. Levick *all* of the persons, firms or corporations furnishing supplies, labor or materials to said vessel are to be notified either by you or ourselves that they cannot hold the vessel for any supplies, labor or materials furnished the said vessel. Upon receipt of this letter you will therefore please notify all persons furnishing said supplies, labor or materials, to the vessel that they must look to Mr. Levick and not to the vessel for payment of same. Please notify me in answer to this that you have done as requested, and let me know the names of the people whom you have notified. I would rather, on account of relationships, have you notify these people than for us to write the letters, because if we wrote it it might in some way injure Mr. Levick, and this I do not wish to do. I have just been informed by Mr. Levick and Mr. Oliver that he has arranged for insurance on the vessel after repairs are made. Thanking you in advance for this courtesy, I am

Very truly yours,"

This is found as a fact by the court (p. 121 of Apostles).

There is no doubt that Mr. Sooy warned the libellant, as he testified, before any of the supplies here involved were delivered (pp. 72-73 of Apostles):—

“Q. Will you recount, please, the conversation you had with Mr. Rudbach on that occasion?

A. In substance, I can; I cannot, of course, give the exact words of it, but I said to Mr.

Rudbach, 'You have furnished an order of goods here to the steamer South Coast'. He said, 'Yes, here they are'; they were laid out in a run-way, a sort of alley-way in his store there, as I recall it, between two streets, and I said, 'Do you understand from Captain Roberts that the ship is not responsible for these bills?' He said, 'Yes, but Captain Roberts tells me that he is going to pay me out of the money that he gets from Levick'. I said, 'Captain Roberts is the President of the South Coast Steamship Company and I am Secretary and attorney for it, and Captain Roberts has just told me', and that was the way Captain Roberts introduced me to Mr. Rudbach, and I said, 'I do not want any question at all about this bill or about any other bills that may be incurred on behalf of the "South Coast", and I have come here particularly to tell you that.'

Q. Was anything further said?

A. Then Roberts said that Levick would be in San Pedro on that afternoon, with the understanding that he was to turn over the money to Roberts, and that Roberts would pay Mr. Rudbach.

Q. That was stated at that time, was it?

A. That was stated at that time.

Q. As a matter of fact, do you know whether Captain Roberts at that time occupied some position on the vessel?

A. He was Captain of the ship.

Q. Employed by whom?

A. By Levick.

Q. For what purpose, for what voyage?

A. For the purpose of going to Ensenada and return.

Q. Just for the one voyage?

A. Just for the one voyage.

Rudbach disputes this; but the court believed Mr. Sooy and not Mr. Rudbach (Opinion p. 121 of Apostles).

“He was also warned by Mr. Sooy, one of the owners, not to deliver any goods on the credit of the ship.”

There is no doubt that Levick, the charterer, acquiesced in the letter which Mr. Sooy sent Mills (testimony of Mills, pp. 94-95 of Apostles):—

“Q. Now, do you remember having received a letter from Mr. Sooy concerning the payment of bills?

A. Yes, that was several days after the boat had arrived.

Q. Several days after?

A. That was after Captain Roberts had told me the same thing.

Q. Captain Roberts told you the same thing?

A. I also received the same information from Mr. Levick that Levick & Oliver were to be responsible for the bills.”

There is no doubt that the libelant had notice. The court found (p. 121 of Apostles):—

“Libelant before furnishing any of the supplies in question was informed that the vessel was under charter to Levick and had been warned by the owners of the vessel not to have any bills go on the ship’s account, and had also been advised that Levick and Oliver would pay the bills.”

There is no doubt that a charter-party may be oral.

The J. Doherty, 207 Fed. 997, 1001.

The H. C. Grady, 87 Fed. 232;

James v. Brophy, 71 Fed. 310.

Consequently, we submit that the terms upon which the vessel was held are not those delineated literally by the charter-party, but those which the parties believed and declared were the true facts of the case; as evidenced not alone by the formal charter-party, but by all of their writings and transactions.

Raymond v. Tyson, 17 How. 53;

James v. Brophy, 71 Fed. 310;

Barreda v. Silsbee, 21 How. 146.

And as we have frequently pointed out, the libellant cannot complain. He never saw the formal writing and he never sought to see it.

We respectfully submit that the decree should be reversed and the libel dismissed.

Dated, San Francisco,

February 28, 1917.

MARCEL E. CERF AND C. H. SOOY,

Counsel for Appellant.

No. 2865

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTH COAST STEAMSHIP COMPANY (a corporation), claimant of the steamer "South Coast", etc.,

Appellant,

VS.

J. C. RUDBACH,

Appellee.

BRIEF FOR APPELLEE.

IRA S. LILLYCK,
Proctor for Appellee.

Filed this day of March, 1917.

Filed

MAR 12 1917

FRANK D. MONCKTON, *Clerk.*

By F. D. Monckton

Deputy Clerk.

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Appellee.

BRIEF FOR APPELLEE.

It is admitted by the appellee that if the charter party in question contained a clause prohibiting the charterers from giving liens on the steamship "South Coast", the appellee would not, under the ruling of the lower Court that he had notice of the terms of the charter, be entitled to a lien for the supplies furnished to the vessel by him. The charter party contains no such express limitation on the legally presumed right of the charterer to give liens on the vessel, but the appellant claims that such a limitation should, necessarily, be implied from the provision in the charter that the charterer should pay for all supplies, repairs, and

other charges against the vessel. This, in our opinion, does not necessarily follow as the one is not in the least inconsistent with the other. Who shall pay for the supplies is one question and whether or not a lien shall attach to the vessel until it is paid, is another entirely independent of the first.

There is some authority for the proposition, contended for by this appellant, in a few early cases decided long before the enactment of the Federal statute giving a lien on a vessel for supplies furnished to it. An examination of these early cases, however, will convince the Court that the rulings there made can not prevail today against the modern law on this subject. We refer to the "Kate", 164 U. S. 458, 41 L. E. 512, and the "Valencia", 165 U. S. 264, 41 L. E. 710, both cited and followed in the case of the "Underwriter", 119, f. 713, relied on by the appellants. We can not better show to the Court the most uncertain state of the law, in this connection, at that time than by referring to the excellent review of the authorities in the latter case by Judge Lowell of the District Court for the Northern District of Massachusetts. The situation was by no means clarified by the local statutes under which most of these cases were decided, but waiving any questions raised by the state statutes, Judge Lowell, on page 751, shows what the various conditions ^{are} surrounding a lien for supplies furnished to a vessel under the general admiralty law and the difficulty of enforcing such a lien. On page 755, the Court

explains the basis of the decisions in the “Kate” and the “Valencia” as follows:

“(b) On the other hand in the ‘Valencia’, 165 U. S. 264, 271, 17 Sup. Ct. 323, 325, 41 L. Ed. 710, it was said that: ‘In the absence of an agreement, express or implied, for a lien a contract for supplies made directly with the owner, in person, is to be taken as made on his ordinary responsibility, without a view to the vessel as the fund from which compensation is to be derived’. * * * And the extended discussion in the ‘Kate’, 164 U. S. 458, 465-470, 17 Sup. Ct. 135, 41 L. E. 512, treats the lien as created by authority confided in the master by the owner. This is to say that the non-existence of the lien in the presence of the owner arises from a want of authority in the master to find the vessel when the owner himself is present.”

It is true that the “Underwriter” does hold that it is only when a vessel is in a port of distress that a supply man will be given a lien, where the terms of the charter party provide that the charterer shall pay for the supplies, but we think that the proctors for appellant are in error when they apparently claim that that case was affirmed in the “Francis J. O’Hara, Jr.”, 229 F. 312. The terms of the charter party, if any, in the latter case are not set out, and, in all probability there was no charter party. The Court found as a fact that the master was without authority to give a lien on the vessel, citing a case decided by the state Court, *Rich v. Jordan*, 164 Mass. 127, 41 N. E. 56, which in turn cited three other cases de-

cided by the Courts of that state: *Uran v. Fletcher*, 1 Gray 125; *Baker v. Haskins*, 5 Gray 596; *Tucker v. Stimson*, 12 Gray 487. It seems that all of those local cases were decided under a rule peculiar to the state of Massachusetts, that is, that the master is prohibited from giving a lien on the vessel where the owner has given over the entire possession and control of the vessel to a third party.

Whether in the *O'Hara* case the denial of a lien was based on a local rule having its inception in a local custom of small fishing craft, or an express limitation of authority in the agreement between the vessel owner and the charterer, is not material, the principal point being that the lien was not denied simply because the charterer had agreed to pay for the supplies. This conclusion is further fortified by the Court citing the "*Eureka*", 209 F. 373, where the charter party contained an express limitation of authority, and observing that the slightest inquiry would have disclosed that the master had no authority to buy on the vessel's account. It seems also that the Court makes a distinction between an agreement to pay for supplies and a limitation of authority to give a lien on the vessel for supplies, and, that the one does not necessarily include the other. Page 314:

"Here the petitioner had no reason to suppose that the vessel was being sailed under a lay which made her liable for supplies, nor that the master had authority to pledge her credit therefor. It furnished the salt without making any effort to find out as to these important facts."

The holding in the "Underwriter", above stated, has been overruled by the Circuit Court of Appeals in the case of the "Surprise", 129 F. 873. In that case supplies were furnished to a vessel under charter and the vessel was held liable therefor. It was contended by the claimant and owner that the libelant was informed of the charter party and that under the terms of the same, the charterers were bound to pay for the operating expenses including supplies furnished to the vessel and to keep the vessel free from liens. It was held that it is immaterial to the right to a lien for ordinary supplies furnished on the order of the master of a vessel being navigated by a charterer, whether or not there is a formal charter party expressly providing that the charterer shall make all disbursements and protect the vessel from liens, since that is an implied condition of every charter. In holding that a maritime lien existed in favor of the libelant for the supplies so furnished, the Court says on pages 877 and 878:

"We should also observe that much has been made of the fact that in 'The Kate' and 'The Valencia', there were formal charter parties which expressly provided that each charterer should disburse the vessel for ordinary current expenses, and protect her from all liens on account thereof. There seems to be an impression that there was something in this fact of special importance; and it has apparently appealed to the legal imagination. It was, however, absolutely immaterial, because, on every charter of the hull of a vessel, the substantial relations of the parties are the

same as those specially provided in 'The Kate' and 'The Valencia'. The charterer is bound to disburse the vessel and protect her from liens, and impliedly agrees to do so, an agreement, as effectual in law as an express one. Moreover, so far as concerns knowledge on the part of a merchant of a charter party or its terms, or the duty arising on a merchant to inquire, there is no essential distinction; because if a merchant knows that the hull is chartered, though orally and informally, he knows as a matter of course, and must be held to know, that the usual obligations pro and con exist; and he could know no more if the whole was expressed in a formal instrument. We emphasize this fact because all the decisions we will hereafter cite relating to vessels where the hull was chartered, bear on 'The Kate' and 'The Valencia', regardless of the fact whether there was a formal charter, or only an oral one without any express statement of the terms thereof.

Coming to the merits of the appeal, it will be found that for each libellant, it is disposed of by 'The Philadelphia', except only so far as a distinction can be made, if one can be, arising from the fact that in 'The Philadelphia' it did not appear that the merchant knew, or ought to have known, that there was a charter, while, at bar, the claimant of the steamer insists that the libellants were expressly informed of the charter and its terms, or were put on notice in reference thereto. The conclusion which we reach will concede that additional element."

The Court observes that, although the vessel was not in a port of distress, the supplies furnished were hand to mouth necessities and so they were in the case at bar. We prefer, however, not to put the

case on that basis, but to regard it from a strictly logical standpoint, as did the judge of the lower Court.

If then, a supply man, by reason of his having knowledge of the charter party is chargeable also with the knowledge that the charterer is bound to pay the operating expenses of the vessel and keep the same free from liens, it must necessarily follow that Congress in giving a lien for supplies furnished on the order of the charterers, or the master representing them, intended that the further presumed knowledge of the charterer's liability for operating expenses should also be immaterial. Any other interpretation would be most illogical and amount pro tanto to an annulment of the act. For example: A supply man furnishes supplies to a vessel on the order of the master representing the charterers. Under the law (Fed. Stat.) he is entitled to a lien on that state of facts; but says the owner, the law presumes that from your knowledge of the charter, you were also aware that the charterers were bound to pay the operating expenses, and consequently you have no lien. Thus the legal presumption in favor of a lien from a given state of facts would be defeated by a further legal presumption from the same state of facts. The conclusion is, therefore, irresistible that whatever the law may have been prior to June, 23, 1910, knowledge on the part of the supply man that the charterer was bound to pay the operating expenses and keep the vessel free from liens, is immaterial under

the Federal Act of said date and that nothing can defeat his lien except affirmative proof that he knew, or ought to have known that the charter party prohibited the charterer from giving a lien on the vessel.

As far as the appellee is concerned, this case should be decided precisely the same as though there was no clause in the charter party requiring the charterers to pay the operating expenses, for it can not possibly be construed into a limitation upon the authority of the charterers to bind the vessel as required by the third section of the Federal Act. The charter party contains no such express limitation, and we have been unable to find any case decided since the statute was enacted which placed the construction upon it contended for by the appellant. On the other hand, the case of the "Surprise" (*supra*) is referred to in *Northwestern Fuel Co. v. Dunkley Williams Co.*, 174 F. 121, 125, and it was admitted that under the rule of that case the lien would have been allowed except for the fact that it appeared from the evidence that credit was given to the charterers and not to the vessel, a circumstance which is no longer material under the Federal statute. Again, the "Surprise" (*supra*) is quoted with approval in the "*J. Dogherty*," (1913), 207 F. 997, on page 1001 as follows:

"By an implied agreement, as effectual in law as if it were expressed, the charterer is bound to disburse the vessel and to protect her from liens. Moreover, so far as knowledge of the charter party on the part of the libelant is

concerned, or his duty to inquire, there is no essential distinction, for if the libellant knows that the vessel is chartered, though orally and informally, he must be held to know, as a matter of course, that the usual obligations exist. The 'Surprise', 129 F. 873, 64 C. C. A. 309."

In the "Oceana", 233 F. 139, 146, it was said that:

"There must be an actual restriction of authority by the owner in the first place, and in the absence of affirmative knowledge of such restrictions, or of circumstances which ought to raise a doubt in his mind, the furnisher is entitled to rely upon the presumption and will acquire a lien, even if the officer or agent in fact has no authority."

The words "must be an actual restriction of authority" are significant.

The charges of bad faith on the part of the appellee need not be considered at length here for if, according to the true construction of the charter party, there was in fact no actual restriction of authority, then there could be no bad faith on the part of the appellee in furnishing the supplies to the vessel. Nor are we disposed to attach any special importance to the clause in the Federal statute: "For any other reason" as that must be interpreted according to the general rule in regard to general words following special words and held to mean "for any other reason similar to the ones set out specially in the statute". The lower Court unquestionably concluded that the charter party in the present case was the only agreement between

the appellant and the charterers which in any way affected the right to give a lien on the vessel, and, consequently, its reference to only the charter party.

It is claimed by the appellant that the letter which it sent to Mr. Mills, set out on pages 49 and 50 of its brief, operated as a subsequent contract or a construction of the former one between the charterer and appellant, and that by its terms the charterers could not purchase supplies on the credit of the vessel. This is on the assumption that Mr. Mills was the agent of the charterers, whereas in fact, he was the agent of the appellant (Apostles, page 61). This is denied by the appellant (page 76), but that is only the conclusion of one of its officers, and a most natural one, in view of the fact that otherwise, it would be prejudicial to the interests of his company. He admits, however, that Mills acted as agent for the South Coast Steamship Company in chartering the vessel to Levick (page 77). It was this same Mills, who was instructed by appellant as its agent to notify those furnishing repairs and supplies to this vessel, that they must look to the charterers for payment, and not to the vessel. It is true that he failed to correctly advise appellee of the contents of the letter containing these instructions, but that does not, in any way, lessen the value of such evidence as showing that Mills was, in fact, the agent, or at least, the ostensible agent for the appellant in connection with this vessel. Besides, it nowhere

appears in the evidence that the charterers agreed to the construction placed on the charter party by the appellant, as set out in the letter to Mr. Mills, who denies having been in the employ of either party (pages 92-93).

Again, it must be remembered, that although, as pointed out in appellant's brief, the appellee never saw the charter party in question, still it having been determined by the lower Court that he had notice of its terms, the case must be determined precisely as though he had read the charter party before furnishing the supplies. In such case it can not be contended that any construction placed upon it by the owner and charterer would be binding upon him but it would be construed according to its legal effect.

The lower Court found that

“while these provisions (of the charter party) require the charterer to pay all expenses incurred in operating the vessel, they do not deprive him of authority to bind the vessel therefor. Indeed, they seem rather to concede to him such authority by providing that he shall save the owners harmless from all liens against the vessel, arising, or created during the term of the charter party” (Apostles, page 123).

In view of such stipulations in the charter party, it would seem unreasonable to hold that the parties did not contemplate that a situation might arise during the course of a voyage which would necessitate the placing of a lien on the vessel. On the

contrary, we think that the owner must be credited with common business prudence, and would not compel the charterer to make an agreement which in all probability would be prejudicial to its own interests. As often remarked in the books: "A ship is made to plow the seas," and if a vessel is compelled to lie idle and rot at the wharf because of needed supplies or minor repairs, the costs of which the charterers can not meet on account of insufficient funds on hand, the owner would be injured to a far greater extent than the charterers in nine cases out of ten. He has his vessel at stake and nothing to indemnify him but the uncertain capability of the charterers to respond in damages, or a chance of preventing a surety company from escaping liability in event that a bond was required to secure the faithful performance of the charter party.

As we view the situation, this Court must either overrule the holding in the "Underwriter" (*supra*), as was done in the case of the "Surprise" (*supra*), or must annul *pro tanto* the provision in the Federal Act giving to charterers, and their duly appointed agents, the presumed right to give a lien upon a vessel for necessary supplies furnished to it.

We respectfully submit that the ruling of the lower Court in this case, that a provision in a charter party requiring a charterer to pay the operating expenses, is not equivalent under the recent statute to a limitation in the charter party on the

authority of the charterer to bind the vessel is a correct statement of the law and that the decree of the lower Court should be affirmed.

Dated, San Francisco,

March 12, 1917.

IRA S. LILLICK,

Proctor for Appellee.

No. 2865

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SOUTH COAST STEAMSHIP COMPANY (a corporation), claimant of the steamer "SOUTH COAST," etc.,

Appellant,

VS.

J. C. RUDBACH,

Appellee.

APPELLANT'S PETITION FOR A REHEARING,
and if that be denied, for Stay of Mandate.

MARCEL E. CERF AND C. H. SOOY,
Mills Building, San Francisco,
*Counsel for Appellant
and Petitioner.*

Filed this.....day of October, 1917.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

FILED
OCT 31 1917

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APPELLANT'S PETITION FOR A REHEARING, and if that be denied, for Stay of Mandate.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellant respectfully petitions for a rehearing of this case, and its counsel, in filing this petition, hereby certify that in their judgment the petition is well founded, and that it is not interposed for delay.

The appellant further prays that if its petition for rehearing be denied, a stay of mandate may be

granted by this Honorable Court for the purpose of enabling appellant to petition the Supreme Court of the United States to remove the case to that court by *certiorari*.

Points.

By its opinion, this court has decided that the law applicable to this case was not altered by the Act of June 23, 1910. This accords with appellant's position, and a rehearing as to this point is not desired.

We do, however, ask a rehearing as to the conclusion reached by this court concerning what the law was before the Act of 1910 was enacted, and consequently concerning what the law now is.

This court concluded that there is a divergence among the cases as to whether a charter-party which requires the charterer to furnish the supplies to the ship, withdraws from the master the power to order supplies, for which the material-man with knowledge of the terms of the charter-party, may assert a lien.

We respectfully submit that neither this court nor appellee's counsel has cited one case which shows any such divergence; whereas we have submitted and will cite in this petition, many authorities which hold, with unanimity, that no lien can be asserted, except in the case of "hand to mouth necessities."

This court referred to the learned and searching opinion of Judge Lowell in *The Underwriter*, 119 Fed. 713, as holding that no lien can be asserted under the circumstances of this case. But this court decided that the decision in *The Underwriter* was disapproved by the Circuit Court of Appeals of

Judge Lowell's Circuit, in *The Surprise*, 129 Fed. 873. Upon that premise, and with the conclusion that *The Surprise* is based upon the stronger reasoning, this court has overruled the opinion of Judge Lowell, and has decided that a lien may be asserted in this case.

In this regard we respectfully submit the following propositions:

(a) The decision in *The Underwriter* was not disapproved in *The Surprise*.

(b) The decision in *The Surprise* was concerned with a different question from that considered by Judge Lowell in *The Underwriter*.

(c) *The Surprise* is based upon facts vitally different from those involved in this case. *The Underwriter* is based upon facts identical with those involved in this case.

(d) There is no case cited in the opinion of the court and no case was cited by appellee's counsel which supports the court's conclusion.

(e) There are numberless cases which support the antithesis of the conclusion which was reached by this court.

Finally this court concluded that the owner's immunity from the necessity of paying the ship's bills did not relieve his ship from that necessity; and that the provision of the charter-party requiring the charterer to hold the owner harmless from any lien asserted, is tantamount to a declaration that liens may be asserted.

Neither of these conclusions is supported by authority, and each of them is completely at variance with decisions upon the precise point. We will refer to those decisions in the argument.

Argument.

I.

This court concluded that the Act of 1910

“was intended as declarative of maritime law respecting the subject, as it existed prior to the enactment. It was not designed to ordain any new or different principle of law.” (Type-written opinion, page 8.)

In this respect the court's opinion coincides with the conclusion reached by the other courts of the country. (Appellant's Brief, pp. 18-20.)

But the law as it existed prior to the enactment of the Act of 1910, was not at all, we respectfully submit, what this court has declared it to have been. This will appear from the twenty or thirty cases from which we will quote in this petition.

Appellee's counsel understands this. He believed that his cause could not prevail if this court concluded that the Act of 1910 did not ordain a different principle of law from that which theretofore prevailed. He said in his brief:

“There is some authority for the proposition, contended for by this appellant, in a few early cases decided long before the enactment of the Federal statute giving a lien on a vessel for supplies furnished to it.” (Appellee's brief, p. 2.)

“The conclusion is, therefore, irresistible that whatever the law may have been prior to June 23, 1910, knowledge on the part of the supply man that the charterer was bound to pay the operating expenses and keep the vessel free from liens is immaterial under the Fed-

eral Act of said date.” (Pages 7 and 8 of appellee’s brief.)

And so we respectfully submit that, having concluded that the Act of 1910 was merely declarative of existing law, the court erred in deciding that that law permits a lien under circumstances of a case like this.

II.

This court recognizes that the masterly opinion of Judge Lowell in *The Underwriter*, is authority for appellant’s position, but this court disregards Judge Lowell’s conclusions for reasons which, we submit, are erroneous.

(a) This court is of the opinion that the decision in *The Underwriter* was disapproved in *The Surprise*.

We submit that this court is in error in this regard. *The Underwriter* is neither mentioned nor referred to in *The Surprise*. The significance of that omission becomes compelling when one realizes that both cases arose in the same circuit; that the opinion in *The Underwriter* is now, and was then, recognized generally by courts and commentators as one of the most scholarly expositions available, of a proposition of maritime law; and that the two cases were decided within a period of two years.

(b) This court failed to note that the decision in *The Surprise* was concerned with a different question from that concerned in *The Underwriter*.

Judge Putnam, in his opinion, limits *The Surprise* to a case concerning "hand to mouth necessities." He says in his opinion:

"We wish, also, before taking up the detailed facts on this appeal, to lay aside another element. What were furnished by these libelants were *hand to mouth necessities*." (34 C. C. A. at page 313.)

Judge Lowell in *The Underwriter* recognized that under such circumstances a lien would be allowed. Judge Lowell says (page 764):

"Where, however, the charter limitation is that found in this case, and where the coal is ordered, not in a port of distress, when it may reasonably be supposed that the further prosecution of the voyage is for the interest of the owner as well as for that of the charterer, I am of opinion that no lien exists."

(c) *The Surprise* is based upon facts vitally different from those concerned in this case. *The Underwriter* is based upon facts identical with those concerned in this case.

In *The Surprise* the supplies were "hand to mouth necessities" (*supra*), and the opinion is based upon that circumstance. This fact is recognized by appellee's counsel; it is emphasized by the court which rendered the decision and it is so declared by commentators.

Counsel for appellee in referring to *The Surprise* says:

"The court observes that, although the vessel was not in a port of distress, the supplies furnished were hand to mouth necessities, and

so they were in the case at bar. We prefer, however, not to put the case on that basis, but to regard it from a strictly logical standpoint, as did the judge of the lower court." (Appellee's brief, pp. 6-7.)

Indeed, appellee readily recognized that he could not put his case on the basis that the supplies were "hand to mouth necessities", notwithstanding that some of them *were liquors and cigars*. (See bills of account filed as original exhibits in this court.)

Judge Putnam was very careful to limit the effect of his opinion in *The Surprise* to the case of "hand to mouth necessities." In the course of his opinion, he says:

"We have no occasion to comment upon, or lay down any rules with reference to, circumstances involving unusual expenses, and with regard to which there would be *ample opportunity to consult the owners* in the usual manner. What, in such event, would be required, in view especially of the fact that *The Surprise* was a *chartered vessel*, is not now relevant. (p. 314.)

We have an ordinary case of minor supplies furnished to a vessel in a foreign port of the class of which she had immediate need, and a large part of which she could not take up conveniently, except at the place where needed; a case with circumstances under which, prior to *The Kate* and *The Valencia*, no admiralty court ever refused a lien, unless the owner showed that there was no necessity for credit to the vessel, and that the *merchant* knew that fact, or had very good reason to know it, *or was in some way clearly put on inquiry*. (p. 315.)
* * * The conditions with regard to the supplies of the classes furnished by Robinson,

when obtained by the authority of the master, express or implied, under the circumstances of this case, are commonly so pressing that they overcome the merely ordinary stipulations on the part of the charterer that he will not burden the vessel with liens." (p. 316.)

A few weeks after rendering his opinion in *The Surprise*, Judge Putnam wrote the opinion in *The New Brunswick*, 129 Fed. Rep. 893, and there he said:

"The petitioner undertakes to bring this appeal within *The Surprise* (decided by us on March 29, 1904), 129 Fed. 873, and *The Philadelphia*, 75 Fed. 684, 686, 21 C. C. A. 501, also decided by us. This he fails to do. In each of these cases, *hand to mouth supplies were furnished* at intermediate ports on the orders of the master, or under such circumstances that they were presumed to be by his orders. Certainly there is nothing in this record to enable us to frame a judgment for any portion of the coal in issue as having been thus ordered."

In *The Philadelphia*, (1896) 75 Fed. 684, 685, (the basis of the decision in *The Surprise*) Putnam, Circuit Judge, said:

"The learned Judge of the District Court found that the supplies, in all of the suits, were furnished on the credit of the respective vessels, and that the libelants had no notice that the vessels were under charter in which it was agreed that the supplies should be furnished at the expense of the charterers. * * *

"The supplies were the reasonable hand to hand quantities of coal and water needed for their use in short coastwise trips."

Another circumstance which, we submit, demonstrates that *The Surprise* does not govern, or even apply to the instant case, is found in the language of the judge who wrote the opinion. It will be remembered that *The Surprise* is based upon the decision of the same court in *The Philadelphia* (supra), and it was of this case that Judge Putnam, who wrote the opinion in *The Surprise*, himself, said (*The Iris*, 100 Fed. Rep. 104, 107):

“In *The Philadelphia* * * *, where it was maintained that the facts were similar to those in *The Kate* and *The Valencia*, the question which arose in those cases was laid aside, because the court found that the supplies were furnished under such circumstances that they were to be held as furnished in a foreign port on the orders of the master, thus bringing the circumstances within * * * the supposed hypothetical case stated in *The Kate* at pages 470 and 471; 164 U. S.”

The hypothetical case to which Judge Putnam refers is stated by the Supreme Court (164 U. S. 470, 471) as follows:

“If the libellant in this case had furnished the coal upon the order of the master, *and without knowledge or notice that the vessel was operated under a charter-party*, or if the coal had been furnished upon the order of the charterer as well as upon the credit of the vessel, *under circumstances which did not charge libellant with knowledge of the terms of the charter-party*, but charged it only with knowledge of the fact that the vessel was being operated under a charter-party, *a different question would be presented.*”

So Judge Putnam practically says that *The Philadelphia*, the basis of *The Surprise*, was decided upon the theory that the furnisher either was ignorant of the charter-party or was ignorant of its terms. Surely a theory which cannot prevail in this case, wherein it is specifically found that the furnisher was notified that the South Coast was under charter and that the charterer was required to pay all bills.

In addition to the evidence which Judge Putnam, himself, furnishes of the fact that his decision in *The Surprise* is limited to the case of "hand to mouth necessities", and in addition to the admission in this regard, of appellee's counsel, we have the criticism of Mr. Fitz-Henry Smith, Jr., in 21 Harvard Law Review 345, where, in referring to *The Surprise*, the commentator says:

"The opinion lays great emphasis upon the character of the necessities furnished the vessel."

(d) There is no case cited in the opinion of the court and none was cited by appellee's counsel, which supports the court's conclusion.

The Surprise, as we have already indicated, does not refer to *The Underwriter*, does not decide the point there involved, is limited to the case of "hand to mouth necessities", and is not authority for a case such as the one involved here.

The only other authority cited by the court in support of its conclusion is *Thomas v. Osborn*, 19 How. 22. In that case *the lien was not allowed*, the libel was dismissed; consequently, the quotation

from that case which is embodied in the opinion of Judge Wolverton, is merely dictum. However, even in that dictum, this illuminating observation is made:

“But this doctrine cannot be safely extended to the case of an owner *pro hac vice*, in command of a vessel. Practically his special ownership leaves the enterprise subject to the same necessities as if the master was merely master, *and not the charterer.*”

Mr. Justice Curtis, who wrote the opinion in *Thomas v. Osborn* (supra) was very familiar with the rule that the master who is part owner, nevertheless maintains his distinct identity as the master, and his powers as such are in no respect affected by his interest as owner. The rule is universally recognized. It is an elementary principle of maritime law. Conklin says (page 80):

“It is only the contracts which the master enters into, *in his character of master*, that specifically bind the ship.”

The matter is elaborately considered in *The Mary Morgan*, 28 Fed. 196.

We have pointed out that there is no case cited in the opinion of the court, and none was cited by appellee's counsel which supports the court's conclusion. On the other hand

(e) There are numberless cases which support the antithesis of the conclusion which was reached by this court.

Some of these cases follow.

- The Columbus*, (1879) 5 Sawy. 487; Fed. Cas. 3044;
The William Cook, (1882) 12 Fed. 919;
The S. M. Whipple, (1881) 14 Fed. 354;
The Secret, (1879) 15 Fed. 480;
Stephenson v. The Francis, (1884) 21 Fed. 715, 725-726;
The Cumberland, (1886) 30 Fed. Rep. 449, 455;
The Ellen Holgate, (1887) 30 Fed. Rep. 125;
The International, (1887) 30 Fed. 375;
The Samuel Marshall, (1892) 49 Fed. Rep. 754, 760;
The Samuel Marshall, (1893) 54 Fed. 396, 398-399, 404;
The Kate, (1896) 164 U. S. 458;
The Alvira, (1894) 63 Fed. 144, 156, 160;
The Rosalie, (1895) 75 Fed. 29;
The H. C. Grady, (1898) 87 Fed. 232;
The Robert Dollar, (1902) 115 Fed. 218, 219-220;
The North Pacific, (1900) 100 Fed. 490;
The Underwriter, (1902) 119 Fed. 713;
The Vigilant, (1907) 151 Fed. Rep. 747, 751;
Northwestern Fuel Co. v. Dunkley-Williams Co., (1909) 174 Fed. 121;
The City of Milford, (1912) 199 Fed. 956;
The Thomas W. Rodgers, (1912) 197 Fed. 772;
The Ha Ha, (1912) 195 Fed. 1013;
The J. Doherty, (1913) 207 Fed. 997;
The Malloa, (1914) 214 Fed. 308;
The Francis J. O'Hara, Jr., (1915) 229 Fed. 312;
The Oceana, (1916) 233 Fed. 139;
The Yankee, (1916) 233 Fed. 919, 925-6.

In *The Columbus*, (1879) 5 Sawy. 487; Fed. Cas. 3044, Judge Hoffman said:

“For these reasons I am of opinion that the lien conferred by the statute is essentially a maritime lien, that it is subject to the same rules and to be tested by the same principles as those which apply to liens for supplies furnished to a foreign vessel, and that it was not intended to confer upon a ‘master, agent or consignee’ an irrevocable power to hypothecate the vessel for supplies in the port where the owner resides, contrary to his instructions, and in spite of his protest, and that the material-man, who, with full notice of the circumstances, furnishes supplies to the master, must look to him personally, and not to the owner or the vessel for repayment.”

In *The William Cook*, (1882) 12 Fed. 919, it is held:

“The libelant is in this case precluded from alleging that the coal was furnished upon the credit of the vessel. The evidence is clear and convincing that he had express notice, from the owners, of the charter-party and of its terms, and that neither they nor the vessel should be held for supplies, and that thereupon the libelant arranged specifically with Pollock, the charterer, for weekly payments. Upon such facts he could not lawfully charge the ship, and the coal must be held to have been supplied upon Pollock’s personal credit. *Beinecke v. The Secret*, 3 Fed. Rep. 665; *The Norman*, 6 Fed. Rep. 406. After such notice it would be a gross violation of justice and equity to permit a material-man to continue to furnish supplies and charge the ship therefor, which would be virtually at the expense of the owners, who had no interest in the supplies and had care-

fully used all possible means of avoiding liability. *The Columbus*, 5 Sawy. 487. There are doubtless circumstances in which the known obligation of the charterer to pay for supplies would not prevent a lien on the ship, as where a vessel is in a foreign port in distress, with no means of obtaining supplies necessary to complete her voyage and reach the hands of her owners, and where express notice not to credit the ship had not been given. In such cases the interests of her owners and the necessities of the case might raise an implied authority in the master from the owners to obtain necessary supplies on the credit of the ship, notwithstanding the charterer's known obligation to pay for them. *The Monsoon*, 1 Spr. 37; *The City of New York*, 3 Blatchf. 187, 188."

In *The S. M. Whipple*, (1881) 14 Fed. 354, decided in this District, Judge Hoffman held:

"Where the owner, who charters a vessel to third parties and under the terms of the charter-party appoints the master for the term of the contract, seeks to displace the lien given by statute for materials and supplies furnished the vessel by setting up a private agreement by which the master was deprived of the authority to create liens on the vessel, he should show by clear proof that explicit and unequivocal notice of the facts was given to persons dealing with the vessel."

The Secret, (1879) 15 Fed. 480.

Blatchford, Circuit Judge, said:

"Although *The Secret* was in a foreign port, and although Murray, Ferris & Co., when ordering the coal, stated to Russell & Hicks that it was for *The Secret*, yet the circumstances were such that the libellant's agents, Russell & Hicks,

were put on inquiry, from which they could easily have learned this, notwithstanding the above facts. Murray, Ferris & Co. were the charterers of the vessel, and had no power to bind the claimant or the vessel to pay for coal bought for her. If they had used due diligence they would have ascertained such want of power."

Stephenson v. The Francis, (1884) 21 Fed. 715, 725-726, where the court says:

"Again, the ship in this case was under no necessity of proceeding upon her new trips, for which this coal was furnished. Savage, by his charter, had no right to pursue her ordinary navigation at the ship's expense. If he could not fit her out for her trips without resorting to her own credit, having no right to use that credit for ordinary supplies, it was his duty to surrender her, or, at least, not to run her until he could arrange to do so without a violation of his agreement with the owner. There was no commercial necessity that she should depart upon this trip; and the general owner had no interest that she should be navigated except according to the terms of the charter. In this respect the case is wholly different from that of *The City of New York*, 3 Blatchf. 189, where the vessel was in a port of distress, on an unfinished voyage, and where the interest of the ship and of her general owner also required the supplies. Broadly considered, therefore, the first requisite for a lien, viz., a necessity for the supplies did not exist. Had Savage, being under no necessity to continue the vessel's trips, and not being in any port of distress, expressly contracted for ordinary supplies on the ship's credit, this would have been a clear wrong to the general owner, and a violation of the terms of the charter, because the stipulation of the charter was for the very

purpose of preventing this. The language of the supreme court in the case of *Gracie vs. Palmer*, 8 Wheat. 605, 639, would in that case seem to be applicable. 'The charterer', the court say, 'has contracted with the shipper (here the material man) to do an act which he could not perform without violating his own contract with the ship's owner; and he must therefore be considered as having entered into a contract subordinate in its nature to that previously existing between the owner and charterer. And this was approved in *The Freeman vs. Buckingham*, 18 How. 182. In the case last cited, *Curtis, J.*, also expressly limits the effect of the ordinary maritime usages to 'contracts * * * entered into with a person who has no notice of any restriction.' Page 490. But, in the present case, *Savage* clearly had no intention of violating the charter, or of obtaining supplies on the ship's credit, and the question of his *power* does not, therefore, properly arise in this case. The notice, moreover, given by the captain to the libelants, was of itself one of the terms upon which the coal was supplied. The captain is the person who in a foreign port specially represents the ship and all interests combined. When he gives notice that the ship is not to be bound for supplies, that becomes one of the terms on which any supplies subsequently delivered must be deemed furnished, and which estop the material-man from asserting the contrary. Considering the knowledge of the charter that the libelants possessed, as well as this notice from the captain, and the fact that the supplies were for the ship's ordinary use, and not under the stress of any maritime necessity, or in a port of distress, the obligations of good faith, without the observance of which no lien is sustained, estop the libelants from asserting any credit to the ship, or holding her answerable." (Citing cases.)

The Cumberland, (1886) 30 Fed. Rep. 449, 455, where the court says:

“The same conclusion would follow in the case of Philbrick, who furnished coal to the amount of \$900 during November, December and January, upon the application of the masters, were it not for one circumstance. He says he had no knowledge of how the boat was being run; that the coal was furnished upon the credit of the boat, and he would not have furnished it upon the credit of the owners or McKay; but he admits that on the twentieth December he met a party who claimed to be her owner, and informed him of the charter and its terms. This I consider sufficient to put him upon his guard, and cause him to make inquiries as to the truth or falsity of the statement, and, if he did not, he cannot claim to have been acting in good faith, and without notice. Judgment will be allowed for the amount of coal furnished before the date when he received this information, and the rest disallowed.”

The Ellen Holgate, (1887) 30 Fed. Rep. 125, where the court held:

“Persons supplying provisions for the crew, and those advancing money to pay the claims of material-men, may look to the vessel for payment, if the transactions have taken place away from her home port, and at the request of her master, unless it can be shown that the master was without authority, and that the parties had knowledge of such want of authority.”

The International, (1887) 30 Fed. 375, where the court says:

“Had this been a question of materials or supplies furnished by a material-man having

knowledge of the terms of the charter, no lien upon the vessel would have been sustained, unless the supplies were furnished in a port of distress, and were necessary to enable the vessel to reach her owners, i. e., unless the supplies were necessary to the ship and her owners, and not merely to the charterer's business." (Citing cases.)

In *The Samuel Marshall*, (1892) 49 Fed. Rep. 754, 760, the court in denying a lien for coal furnished on the order of the master, said:

"But the merchant is presumed to know that it is a common thing for a vessel to be hired, and to be managed and used, in the employment of others, under charter-party with the owner or otherwise, under circumstances where the obligation for supplies does not rest upon the owner. And if the facts presented to him are sufficient to induce a reasonably prudent man, having a just regard to the rights and interests of others, to suppose it probable that the owner is not employing the vessel, but that it is in the service of another, under charter or other agreement involving the payment of charges and expenses by the charterer or lessee, he is bound in good faith to inquire. When the circumstances denote that the owner of the vessel is not the party for whose interest the supplies are furnished, and would not be at fault if they were not paid for, it would be inequitable that a merchant should have the right to give credit to another, and assert a lien therefor, contrary to the stipulations and interests of the owner. * * * The merchant is under no obligation to furnish the supplies. He may do so, or not, and he may sell for cash or on credit, as he thinks advantageous to himself. If he does furnish and on credit, in the face of an agreement between others of which he has notice, devolving the obligation of pay-

ment upon another than the owner, and denying to the charterer the right to hypothecate the ship, he ought not to be allowed to assert a lien upon the owner's property."

The decision in this case was affirmed (*The Samuel Marshall*, (1893) 54 Fed. 396) and in writing the opinion of affirmance, Taft, Circuit Judge, said (pp. 398-399):

"The questions in the case are two: First. Did the libelants obtain a lien for the coal furnished to the steamer *Marshall* under the general maritime law? Second. If they did not, then are they entitled to a lien under the state law of Michigan? Judge Severens, in the court below, held, in a satisfactory and convincing opinion, that they had no lien in either aspect of the case, and we entirely concur with him in that view."

Judge Taft also said (p. 404):

"It is true that, under certain circumstances, the master of a vessel, under a charter, where the charterer is the owner pro hac vice, may hypothecate his vessel for supplies, contrary to the terms of the charter-party, but this is where there is dire necessity to save the vessel, or to bring her home within the reach of the owners. No such case is here presented. This was the home port of the charterers. The necessity was only that of going on the voyages for which the vessel was chartered, and not to bring the vessel home to its owners, or to save it from injury or loss."

The decision was followed in *The Kate*, (1893) 56 Fed. 614, and the latter was affirmed in

The Kate, (1896) 164 U. S. 458,

where the Supreme Court said:

“If no lien exists under the maritime law, when supplies are furnished to a vessel upon the order of the master, under circumstances charging the party furnishing them with knowledge that the master cannot rightfully, as against the owner, pledge the credit of the vessel for such supplies, much less one is recognized under that law where the supplies are furnished, not upon the order of the master, but upon that of the charterer who did not represent the owner in the business of the vessel, but who, as the claimant knew, or by reasonable diligence could have ascertained, had agreed himself to provide and pay for such supplies, and could not, therefore, rightfully pledge the credit of the vessel for them.

* * * * *

If the libelant in this case had furnished the coal upon the order of the master, and without knowledge or notice that the vessel was operated under a charter-party, or if coal had been furnished upon the order of the charterers as well as upon the credit of the vessel, under circumstances which did not charge libelant with knowledge of the terms of the charter-party but charged it only with knowledge of the facts that the vessel was being operated under a charter-party, a different question would be presented.”

The opinions rendered in *The Samuel Marshall* (supra) were approved by Judge Morrow in this district in *The Alvira*, (1894) 63 Fed. 144, 160, in which the learned judge said:

“Counsel for claimants rely greatly upon *The Samuel Marshall* case, 49 Fed. 754; Id. 4 C. C. A. 385, 54 Fed. 396. The opinions in that case contain a very satisfactory statement of the law of domestic liens, both in the decisions of the district Judge and of the appellate

tribunal (Circuit Court of Appeals, Sixth Circuit); but upon a careful reading of the case I do not find anything inconsistent in the law, as there expounded, with that of the case at bar. The facts are of a different character, and this, of course, must be taken into consideration. In that case both the lower court and the appellate tribunal held that actual notice had been given to the supply man. In the case at bar no actual notice was given to the material men, nor am I able to find, from the evidence produced, that they were in possession of such facts as ought to have put them upon inquiry, or that their failure to be informed was due to carelessness or indifference. In the case of *The Samuel Marshall* the owner had no actual notice of the furnishing of the coal, and had, therefore, no opportunity of protecting himself by notifying the supply man. In the case at bar the owners were fully apprised of the fact that repairs were being made, and that materials were being furnished therefor. There, the coal for which a lien was claimed was something which the charterer was bound to furnish, and for which the owner received no direct benefit; here the owner derives some benefit in getting back an improved vessel. I do not allude to this last feature as constituting a distinguishing mark which would require the application of different principles of admiralty law, but simply to show that the facts of the *Samuel Marshall* case are not analogous, in their main features, to the case at bar."

In the course of his opinion in *The Alvira* (supra) Judge Morrow lays down the precise rule for which we contend in this case. He says:

"Therefore, the general principle that the owner is deemed to consent to the accruing of liens where the entire possession, control, and management of a vessel is intrusted to another

is qualified by this condition: If the supply or material man know of the charter or the relation in which the ostensible owner holds, or if he be advised of the real status of such relation by the general owner or by the charterer, or is placed in possession of such facts as would put, or ought to put, a reasonably prudent man on inquiry, the presumption arises that the supplies, materials, or repairs were furnished upon the credit of the charterer himself, and there is no lien. And the onus lies on the supply or material man to remove this presumption. The reason for this is plain. Courts of admiralty do not favor secret liens; otherwise, owners would often fall an easy prey to liens created by injudicious or unscrupulous charterers. Moreover, the supplies, materials, or repairs are generally furnished exclusively for the benefit of the charterer; at least it may be said that he is the party primarily benefited thereby, the owner, as a general rule, being only incidentally benefited, if at all." (Page 156.)

Finally, in *The Rosalie*, (1895) 75 Fed. 29, Judge Morrow held:

"Where materials were furnished for the use of a vessel, upon the order of a company which had possession of her under a contract of purchase, and which was, therefore, the owner pro hac vice, in the port where such company had its principal place of business, by material men who either knew the company's relation to the vessel, or were in possession of the avenues of information, and of facts sufficient to put them on inquiry, held, that credit must be considered to have been given to the company, and that, consequently, no lien was created. *The Alvira*, 63 Fed. 144, distinguished.

The mere fact that persons furnishing materials in the home port, on the order of the owner

pro hac vice, 'suppose' that the vessel is good for the purchase price, is not of itself sufficient to create a lien."

Another decision rendered in this District and which, if followed, is absolutely determinative of the instant case, is *The H. C. Grady*, (1898) 87 Fed. 232, where Judge De Haven said:

"The materials were furnished and repairs made at the request of Captain Denny, the master of the vessel. The remaining libels referred to are for supplies furnished. The evidence shows that the supplies were also furnished for the use of the steamer upon the order of Capt. Denny. Neither of the libelants made any inquiry in relation to the ownership of the steamer, or as to whether she was being operated by any person other than her owner.

It is claimed by the intervener, Strong, that under these circumstances, the libelants are not entitled to enforce a lien against the steamer. I do not think this contention can be sustained. The person upon whose order the supplies were furnished, and repairs made, was the master of the steamer, duly appointed such by the said Strong, her registered legal owner. Strong, as before stated, was and is a resident of Portland, Or., and the supplies were furnished for the use of the steamer, and the repairs made upon her, in San Francisco. It is the rule of the general maritime law that the master, in the absence of the owner, has authority in a foreign port to bind his owners for necessary repairs and supplies. * * * When these supplies were furnished, and repairs made to the steamer *H. C. Grady*, her owner, Strong, was absent in Portland, Or., and the steamer was in a foreign port, within the meaning of the maritime rule just stated, as it is well settled that a port is deemed to be foreign to a vessel which is not

in the State where she belongs, and where her owner resides.

* * * * *

There was nothing, in the facts or circumstances, under which the master contracted with either of the libelants, sufficient to suggest the slightest doubt of the actual authority of the master to order the supplies and repairs, and the libelants were therefore not required to make any inquiry as to his actual authority, but had a right to presume that he was clothed with the ordinary powers of a master, and that he was not acting in violation of instructions given him by his principal. The supplies and repairs were necessary, and therefore within the general authority of the master to procure.

* * * * *

In addition to what has been said in relation to the contracts under which the several claims of Whelan & Whelan and McMurphy & McAvoy arise, it is proper to state that said libelants supposed that the steamer was responsible for the work performed and materials furnished by them, and that they would have a lien upon her for the value of such work and materials; but neither of said libelants made any inquiry regarding the ownership of the steamer, or whether Crocker & Brooks had any right to pledge the credit of the steamer for the work and materials ordered by them. On August 6, 1897, when perhaps about one-half of their respective claims had accrued, Crocker & Brooks, as principals, and said libelants as sureties, executed a bond, whereby they became 'jointly and severally bound unto Fred R. Strong in the sum of one thousand dollars'.

* * * * *

The libelants were informed by the recitals contained in this bond that Strong was the owner of the steamer, and that Messrs. Crocker & Brooks were in possession of, and were about to operate the steamer, under a contract to

purchase; and if they were not directly informed by such recitals that the vendees were to permit no claim or lien to accrue against the steamer, while in their possession, and until fully paid for by them, they were at least put upon inquiry as to the terms of such contract. The libelants, however, did not inquire as to the terms of the agreement, and, under such circumstances, there is a conclusive presumption that, if inquiry had been made, they would have been fully informed in relation thereto. They are therefore charged with knowledge of the fact that Crocker & Brooks were in possession of said steamer, under an agreement for its purchase, and by the terms of which they had further agreed with the intervener, Strong, that all alterations in, or repairs which they caused to be made to, such steamer, should be paid for by them, and that they were not to permit any liens to accrue against such steamer while it should be in their possession under that contract.

* * * * *

As before stated, some portion of the claim of Whelan & Whelan is for materials furnished and repairs made by them upon the order of the master; what portion, however, does not appear, nor whether such materials were furnished and repairs made before or after the execution of the bond above referred to. If before, it was incumbent upon the libelants to prove the fact, and the value of such materials furnished and repairs made; and if after its execution their claim therefor must be held to be subordinate to that of the intervener, Strong, because, as we have seen, they were charged, by the recitals in the bond, with notice of the terms of the contract under which Strong had parted with the possession of the steamer, and such contract was sufficient to put the libelants upon inquiry as to the authority of the master to bind the steamer for materials and repairs

while in the possession of Crocker & Brooks, under their contract to purchase, and they made no such inquiry.”

Judge Hawley recognized the same doctrine when he said in *The Robert Dollar*, (1902) 115 Fed. 218, 219-220:

“It is shown by the uncontradicted evidence in this case that, while the Robert Dollar was being operated as a carrier of freight and passengers between Seattle and Nome and other places in Alaska, it was necessary for her to replenish her supplies of coal and water at Dutch Harbor, both in going north and returning; that her master did not have money to pay her bills for these necessities; and that upon his request the libelant furnished coal, water, and provisions to the steamer, which were necessary for her use and to feed her passengers and crew; that neither the owner nor charterer had any credit at Dutch Harbor; and said supplies had to be obtained on the credit of the ship. These are the conditions under which, by the maritime law, a lien becomes attached to a ship, and the only semblance of a defense to this part of the case is made upon the ground that by the charter party it was agreed between the owner and the charterer that the latter should pay all the bills incurred in operating the vessel during the period for which she was hired, and should at the expiration of said period, return the vessel to her owner free from liens. It is not pretended that the libelant had actual knowledge of this stipulation in the charter party; but it is claimed that the fact that the vessel was chartered to the Alaska & Pacific Steamship Company had been announced in newspapers, and was generally known among merchants and shipping men, and that the captain had possession of a copy of the

charter party; so that if the libelants had made inquiry they might have become informed with respect to its conditions. There are two reasons why this defense cannot prevail. In the first place, the indebtedness was incurred by the master of the ship, who was appointed by the owner, and whose authority was ample to abrogate the agreement whenever it became necessary to do so in order to enable the vessel to get on and complete her voyage. The second reason is that this defense is not available to the charterer. Liens for supplies upon chartered vessels, in favor of creditors to whom notice has been given that the owners have parted with their possession relying upon agreements that the charterers will keep them free from liens, are not permitted, because the pledging of the credit of a ship under such conditions would be fraudulent, and the courts have refused to recognize such fraudulent claims in cases in which the owners have appeared to defend against them. But when a charterer obtains supplies on the credit of a ship in violation of a promise made to the owner that he will not do so, he has no right to plead his own broken promise to defeat his creditors."

Judge Hawley allowed the lien, but the decision was reversed by this court and the libel was dismissed (116 Fed. 601).

In *The North Pacific*, (1900) 100 Fed. 490, the Circuit Court of Appeals for this Circuit, held:

"The terms of a time charter of a steamer contained provisions indicating that the venture was to some extent a joint one between the owner and charterers. The owner, who was a member of a firm of shipping agents, was to sell the tickets for passage on the contemplated

voyages, and his firm were advertised as agents for the vessel. The office of the charterers was also with such firm, with nothing to indicate that the business was separate. *Held*, that one furnishing to the vessel necessary supplies for the voyage on the order of the master, without either actual or constructive notice of the charter, was entitled to a lien on the vessel therefor, although by the terms of the charter such expenses were to be paid by the charterer."

The Underwriter, (1902) 119 Fed. 713, was quoted *in extenso* in our brief. Now we merely quote from the syllabus as follows:

"A charter-party providing that the charterer shall provide and pay for all the coal used by the vessel, and that the master, although appointed by the owner, shall be under the orders and direction of the charterer as regards employment, agency, or other arrangements, is not merely a contract between the parties which binds the charterer to reimburse the owner for coal paid for by the latter, but is also a limitation on the authority of the master to bind the owner or the vessel for such supplies; and no lien upon the vessel exists in favor of libellant who supplied coal on the order of the master in a foreign port, but which was not a port of distress, and was merely across the river from the home port, where the owner resided, and no actual necessity was shown for pledging the credit of the vessel, and where libellant knew the vessel to be under charter, and was put upon inquiry as to the terms of the charter."

In *The Vigilant*, (1907) 151 Fed. Rep. 747, Judge Gray, speaking for the Circuit Court of Appeals for the Third Circuit, said (p. 751):

“Notwithstanding the ability of the distinguished judge who delivered the opinion of the court in that case, we are unable to agree that statutory liens of the kind here in question are thus limited. Upon the facts as stated, the case was correctly decided, and the proposition contained in the language above quoted was not necessary to sustain the decision. The Samuel Marshall had been chartered from its owner, with the express stipulation that the charterer was to have full control, employing and discharging officers and men, and with the obligation of paying all running expenses, including the purchase of coal. Libelants furnished coal to the vessel thus chartered, with knowledge of the fact of the charter, and that the master, who ordered the coal, was directly in the employ of the charterer. They also knew that the charterers were under obligation to furnish the coal, and that they had no authority, by themselves or by their agent, to make the owner liable therefor. Under this state of facts, it was held that the supply men had notice that the company had chartered the vessel, and that the coal was furnished on the credit of the charterer, and not of the vessel, and that, therefore, no lien attached under the Michigan statute, giving a lien for all debts contracted for by the owner or master on account of supplies furnished. No debt can be incurred, or lien established on its account, under the maritime law or the statute of the state, except by the authority, express or implied, of the party to be charged. In this case, there was express knowledge by the libellant of the stipulation by the charterer, which rebutted any implication of the authority on the part of the master to charge the vessel. The fundamental principles of agency cannot be ignored in the creation of liens, either by the law, maritime or the statutory law of the

State. The case of *The Kate*, 164 U. S. 458, 465, 17 Sup. Ct. 135, 140, 41 L. Ed. 512, was decided upon the same grounds.”

The latest decision preceding the act of 1910, which we have been able to discover is that rendered by the Circuit Court of Appeals of the Seventh Circuit (Grosscup, Baker and Kohlsaatt, Circuit Judges), on October 5, 1909, in the case of *Northwestern Fuel Company v. Dunkley-Williams Co.*, 174 Fed. 121.

Every detail of fact in that case is so precisely the same as the facts in the instant case, and the decision there is so perfectly contrary to the opinion here, that, we submit, the present decision should not stand without further consideration and without an express disapproval of the conclusion reached by the Seventh Circuit, should it be found that that decision is erroneous.

When one compares *Northwestern Fuel Company* case (*supra*), with the instant case, he finds every detail of fact identical. He finds the same provisions respecting the necessity that the charterer shall supply the ship; he even finds “the provision that the charterer will hold the owner harmless from all liens against the vessel,” which the learned District Judge felt was so compelling in this case (p. 10 of typewritten opinion). In the *Northwestern Fuel Company* case it was fuel that was furnished, coal to permit the vessel to “discharge its peculiar function” of carrying on maritime commerce. The fuel was sometimes received by the

captain, himself, personally. "The engineer usually signed the receipt for coal, but sometimes such receipts were signed by the captain, the same being charged on the books of the libelant to the steamer, care of Chicago and Milwaukee line" (p. 124). The libelant testified that: "He gave credit to the vessel upon the supposition that he would have a lien upon her in any event" (p. 125). In neither case did the owner expressly declare to the charterer, in the charter-party: "Thou shalt not permit a lien to attach to this vessel!" Nor in either charter-party was there anything "that unalterably inhibits the master or the charterer from incurring any expenditures on the credit of the ship that may become a lien thereon" (p. 10 of typewritten opinion). Yet in the instant case, without even a reference to the decision of the Circuit Court of Appeals for the Seventh Circuit (the last decision of any court prior to the act of 1910), the lien is allowed.

In *Northwestern Fuel Company v. Dunkley-Williams Company* (supra), the Circuit Court of Appeals said:

KOHLSAAT, Circuit Judge (after stating the facts as above). The test of liability herein is conclusively stated by the Supreme Court in the case of *The Valencia*, 165 U. S. 264, 17 Sup. Ct. 323, 41 L. Ed. 710, as follows, viz.:

"One furnishing supplies or making repairs on the order simply or a person or corporation acquiring the control or possession of a vessel under such a charter-party cannot acquire a maritime lien, if the circumstances attending

the transaction put him on inquiry as to the existence and terms of such charter-party, but he failed to make inquiry, and chose to act on a mere belief that the vessel would be liable for his claim."

It appears that libelant delivered the coal under the impression that the vessel would be liable therefor in any case. This accounts for its lack of diligence in making investigation as to the facts. The credit was not given to protect the owner's interest in the steamer, but that of parties for the time being operating the boat. Therefore, the question for the court to pass upon is whether libelant had actual knowledge, or was chargeable with knowledge, of the charter-party between appellee and the Chicago Transportation Company. The term "Chicago and Milwaukee Line" seems to have been merely descriptive of the class of traffic the Petoskey was engaged in, and did not constitute a name. This was of itself a circumstance calculated to raise inquiry. Any effort on the part of libelant to ascertain why the owner of the steamer should operate under such a phrase would have resulted in the discovery of the charter-party and its terms. Nothing short of fatuous confidence in the liability of the steamer for supplies under all conditions can explain the failure to make investigation. Moreover, appellee introduces evidence to the effect that notice of the charter-party was mailed to libelant. The latter denies receiving any such letter. While this may not be conclusive proof of notice, as against libelant it relieves appellee from all suspicion of negligence in the premises, if any would otherwise attach. That no evidence is adduced as to notice to other furnishers of supplies is not persuasive, since the item of coal would be the first to be looked after. We deem it clearly

shown that whatever negligence there was in the premises was that of libelant.

The attempt to construe the language of the charter-party so as to give libelant the benefit of the clause prohibiting liens to accumulate in excess of \$1,000 we deem without merit. Appellee was entitled under the agreement to receive the Petoskey free of all liens. The \$1,000 clause served its mission when it placed it within the power of appellee to enforce the forfeiture clause. It was evidently placed in the charter-party for the benefit of appellee, and not for the solace of those furnishing supplies without reasonable investigation as to responsibility. It is difficult to understand how an owner could protect himself against parties furnishing supplies without using due diligence to ascertain the facts, unless it be required that he do as appellant suggests: paint a notice upon the vessel—a method which does not commend itself to our judgment. This opinion is not at variance with that of Judge Putman in the case of *The Surprise*, 129 Fed. 873, 64 C. C. A. 309, since here we find that libelant was put upon notice of the charter-party.

The finding of the district court is affirmed.”

Up to this point our quotations have been taken from cases decided under the law prevailing prior to the enactment of the act of June 23, 1910. The subsequent quotations come from cases decided under the act.

In *The City of Milford*, (1912) 199 Fed. 956, an agreed purchaser was in possession of the ship under a contract, and there was nothing therein which unalterably inhibited the purchaser from incurring expenditures on the credit of the ship that

might become a lien thereon. In fact the contract required the purchaser to provide a bond to protect the owner against liens upon the ship. The supplies involved in the libel were supplied upon the order of the master. It would not be simple to conceive of a case more nearly parallel with the instant case. Yet the decision was based entirely upon the question of notice. The court, in its opinion, subjects the testimony to a close analysis, and concludes therefrom that the material-men had no notice that the person in possession held the ship under a contract requiring it to pay for the supplies; and, consequently, allowed the lien. The court said:

“There is nothing in the evidence to suggest that any of the libelants had notice that the company was not the sole owner of the ship. A number of them proved that, before extending credit, they were told that the company owned the ship. * * *

The claimant's engineer in person gave the orders for some of the supplies, repairs or services. He approved the bills for others. * * * the claimant, * * * says that, had the libelants exercised the reasonable diligence required by the statute, they would have made further inquiry before extending credit.

* * * * *

Did the act require them to do all this? Its purpose was to simplify the law. There was need for it. The battle as to the liability of the ship for materials and services furnished it has been going on for centuries. Judge Lowell, in that wonderfully learned and exhaustive opinion of his in *The Underwriter*, (D. C.) 119 Fed. 713, tells a story of the long struggle. He shows

how the questions of substantive law and of policy involved had in the course of hundreds of years become confused and complicated, by being mixed up with differences as to rules of procedure and with disputes as to jurisdiction between the courts of admiralty and those of common law. Rights of materialmen might depend upon whether, when they furnished supplies, the ship was in a foreign or in a domestic port. * * * The distinction between foreign and domestic ports had come to be without substantial reason. Congress, in the act referred to, has abolished it.

* * * * *

The general purpose of this enactment is plain. Hereafter, when supplies are furnished for a ship to one lawfully having the management of the ship, the presumption is that the ship is liable for them. If the material-man knows nothing about the authority of the person in possession of the ship, except that he visibly has the management of it, he may furnish the supplies, and the ship will be bound for them. But he may know something more. He may have knowledge that the person entrusted with the management of the ship has, by agreement with the real owner of the ship, no right to subject it to liens. If, under such circumstances, a material-man furnishes supplies, he cannot hold the ship. If he could, he would profit by his own wrong. Even when he does not know certainly that the person having the management of the ship has no authority to bind it, he may have learned such facts or circumstances as will suggest to him the probability that such may be the case. If so, he may not shut his eyes and his ears to further inquiry. He cannot say: 'I admit that I heard something which, if true, indicated that the person who was ordering the supplies had no right to bind the ship for them; but I did not

know whether that which I had heard was true or not. I could easily have made inquiries, and, if I had inquired, I would have found out the truth; but I did not do so.'

He who is so careless of other men's rights will find that his own will be determined, not by what he absolutely knew, but by what it was in his power to find out, if he had acted with ordinary and reasonable care. And so the act provides that nothing in it shall be construed to confer a lien when the furnisher knew, or by the exercise of reasonable diligence could have ascertained, that because of the terms of the charter-party, or agreement for sale of the vessel, or for any other reason, the person ordering the repairs, supplies, or other necessities, was without authority to bind the vessel therefor.

Before this proviso can have any application, something must have occurred to put the furnisher of the supplies upon inquiry. The proviso is a proviso. It is to be understood in such sense as will harmonize it with the general purpose of the act. That purpose was to make the management of a vessel at its port of supply presumptive evidence of the right to bind it for supplies there furnished. That purpose prevails unless it shall be shown that the person so managing the vessel was unlawfully or tortiously in possession or charge of it, or unless something has been brought to the knowledge or attention of the person furnishing the supplies which in honesty and good conscience puts upon him the duty of inquiry as to whether the person who has the management of the ship has the right to pledge its credit." (Citing cases.)

The *Thomas W. Rodgers*, (1912) 197 Fed. 772, and *The Ha Ha*, (1912) 195 Fed. 1013, are each of

the same assistance in the present problem as is *The City of Milford* (supra).

The J. Doherty, (1913) 207 Fed. 997, cannot, we submit, be distinguished from this case. There the person ordering the towage was authorized under the Act of 1910 to bind the vessel, because he was the managing owner of the charterer. Yet the court held there was no lien. The court said (page 1001):

“In the light of these principles the case at bar presents no difficulty. The effect of the charter was to give the charterer entire control of the movements and navigation of the boat, and the fact that the owner paid the man in charge is not sufficient to prevent the charter from being a demise of the boat. *Monk v. Cornell Steamboat Co.*, 198 Fed. 472; 117 C. C. A. 232. The fact that the charter was oral, without any express statement of the terms thereof, is immaterial. By an implied agreement, as effectual in law as if it were expressed, the charterer is bound to disburse the vessel and to protect her from liens. Moreover, so far as knowledge of the charter-party on the part of the libellant is concerned, or his duty to inquire, there is no essential distinction, for if the libellant knows that the vessel is chartered, though orally and informally he must be held to know, as a matter of course, that the usual obligations exist. *The Surprise*, 129 Fed. 873; 64 C. C. A. 309. It is quite possible that the libellant believed that it had a lien, no matter who was relied upon to pay. But this was not giving credit to the vessel. *The Samuel Marshall*, 54 Fed. 398, 4 C. C. A. 385. Nor was its method of charging the items. *McCaldin vs. The Stroma*, 53 Fed. 281, 3 C. C. A. 530. Knowledge that the boat was chartered, and the neces-

sary implication in such a business as this that the charterer should pay for towage, as well as the course of dealing directly with the charterers, and the testimony of the libelant's clerk, Oliver, as to the usual practice of collecting from charterers are sufficient to prevent a recovery from the libelant." (Citing cases.)

In *The Malloa*, (1914) 214 Fed. 308, the person in charge was not inhibited from incurring any expense on the credit of the vessel which might become a lien thereon, and yet Judge Cushman proceeded to consider the question of notice and decided (we quote from syllabus):

"Facts considered, and held not such as to put one making repairs on a vessel on inquiry as to the authority of the person contracting for the repairs, who was an agreed purchaser of a part interest, and in possession, to bind the vessel therefor under the provisions of Act June 23, 1910."

In *The Francis J. O'Hara, Jr.*, (1915) 229 Fed. 312, the court said:

"It is not contended that under the general admiralty law a lien would attach for this salt. The lien claimed arises, if at all, under the Act of June 23, 1910 (U. S. Comp. St. 1913, Sec. 7785), which provides in substance that any person furnishing supplies to a vessel shall be entitled to a lien, and that the master shall be presumed to have authority from the owners to secure supplies for the vessel. It further provides (Section 3) that nothing in the Act shall be construed to create a lien when the furnisher, by the exercise of reasonable diligence, could have ascertained that the person ordering the supplies was without authority to bind the vessel therefor. The salt was ordered

by the master of the vessel. He was in fact without authority to bind the vessel therefor. *Rich v. Jordan*, 164 Mass. 127; 41 N. E. 56.

The real question is whether, upon the agreed facts, the intervening petitioner could, 'by the exercise of reasonable diligence', have ascertained the master's lack of authority. The petitioner knew that the vessel was being sailed on a lay; it knew that on some lays the vessel would be liable for the salt, and that on others she would not. It made no inquiry whatever, either from the master or the managing owners, though it might easily have done so, as to what lay she was being operated under, and it had no information on the subject from other sources. It is not stated in the agreed facts that the master, if inquired of, would not have told the truth. On several previous occasions salt had been furnished by the petitioner to the vessel when she was on the one-half lay, and was therefore liable for it, and it had been paid for by the owners. The last time before that here in question was more than two years previous, in May, 1909; and there had not been thereafter anything equivalent to a continuous course of dealing between the vessel and the petitioner, from which authority to buy supplies on her account might be inferred. There was no actual or constructive representation that the vessel was on the half lay or was liable for supplies when this salt was purchased.

The case is not like *The City of Milford* (D. C.) 199 Fed. 956, where the libelants acted on information which they supposed reliable, and were held to have been justified in so doing, though the information turned out to be false. It is said in the opinion in that case: 'I am persuaded that those witnesses who have testified that he (the president of the company which was the agreed purchaser of the vessel) and the other agents of the company lead them (the lienors) to believe that it was the owner

of the ship have testified truthfully and accurately.' Rose, District Judge, *The City of Milford*, (D. C. ubi supra) 199 Fed. at 958.

Here the petitioner had no reason to suppose that the vessel was being sailed under a lay which made her liable for supplies, nor that the master had authority to pledge her credit therefor. It furnished the salt without making any effort to find out as to those important facts.

It seems to me that the petitioner, knowing that the vessel was on a lay, was bound to inquire whether that lay was one under which she, or the master and crew, were to pay for the salt. *The Eureka*, (D. C. Cal.) 209 Fed. 373. The slightest inquiry would have disclosed that the master had no authority to buy it on the vessel's account."

In *The Oceana*, (1916) 233 Fed. 139, the provisions respecting payment for repairs, keeping the vessel free from liens and holding the owner harmless from all liens asserted against the vessel, are substantially the same as the corresponding provisions of the charter party in the instant case.

"Until the ship should be fully paid for the purchaser covenanted, among other things:

"(a) To keep said ship clear of any liens from any cause, and if any lien or libel is filed or asserted the same shall be immediately bonded by the purchaser. The purchaser agrees to promptly pay current bills, for supplies and repairs to said ship and exhibit at reasonable times the ship's accounts and bills to seller's representatives.

"(b) To keep said ship and equipment in good repair."

Nevertheless the court recognized that if the fact that the vessel was chartered had been brought to the attention of the material men, no lien could have been asserted by them.

The court held (we quote from the syllabus):

“The owner of a steamship made a contract for its conditional sale, to go into immediate service on its delivery, which was to be as soon as certain preliminaries could be arranged. Within a very few days, and before formal delivery, agents of the purchaser, including the chief steward and commissary went on board and took actual charge for the purpose of repairing, equipping and supplying the vessel for sailing. Such agents ordered and received repairs, supplies and other necessities with the knowledge of the seller, which also knew that the bills therefor were not paid, but took no steps to notify the persons furnishing the same that they could not look to the vessel for payment. More than a month after delivery, the seller exacted a second payment on the purchase price with knowledge that a large sum was then due and unpaid for such supplies, etc., in violation of the terms of the contract of sale, which required the purchaser to promptly pay all such bills, to keep the vessel free from liens, and to at once procure the release of any liens filed or claimed, and provided that on failure to comply with such requirements the seller might terminate the contract and retake possession. Held, that all persons so furnishing repairs, supplies and other necessities both before and after formal delivery of the vessel, without knowledge or notice of the contract of sale, were entitled to liens as against the seller

which had retaken possession under the contract.”

In *The Yankee*, (1916) 233 Fed. 919, the court allowed the libel because the supply man had no knowledge that the vessel was under charter. The court said (pp. 925-6):

“But it is contended by the claimant, that even if it should be found that actual deliveries had been made to the vessel they were made upon orders of the charterer under circumstances which destroyed the statutory presumption of its authority. Unquestionably the presumption of the statute may be removed and the right to a lien based upon it destroyed by affirmative proof which actually displaces it. *The Patapsco*, 80 U. S. (13 Wall) 329, 20 L. Ed. 696. This the statute contemplates by prescribing that no lien is conferred ‘when the furnisher knew or by the exercise of reasonable diligence could have ascertained, that because of the terms of a charter-party, agreement for sale of the vessel, or for any other reason, a person ordering repairs, supplies or other necessities, was without authority to bind the vessel therefor’. This proviso is nothing more than a statutory declaration of a principle long recognized in maritime jurisprudence and repeatedly announced by the Supreme Court of the United States. *The Kate*, 164 U. S. 458; *The Valencia*, 165 U. S. 264. It is in effect that no lien shall be afforded and no presumption given in aid of a materialman who furnishes supplies under circumstances which put him on inquiry as to the authority of the one giving the order to bind the vessel. That is, no one with knowledge that supplies are ordered by one without author-

ity to pledge the vessel, or no one awake to circumstances which suggest inquiry as to that authority, may shut his eyes to what he sees or to what he could see by looking, and avail himself of the remedies or the presumptions of the law."

III.

This court concluded that the requirement that the charterer and not the owner should pay the ship's bills was not tantamount to an agreement that the owner's property (the ship) need not pay them.

We respectfully submit that the application of such a principle is very striking. If an owner need not pay money, but his property will be sold under a lien if he does not pay it, assuredly he is without much comfort! If a person's property may be sold for a debt which he need not pay, assuredly he will conclude that it is only sophistry to say that he need not pay it!

The very point has been considered.

In *The Sarah Cullen*, 45 Fed. 511, the court said:

"the libelant was informed that the Ridgewood Ice Company was to pay the towage which was equivalent to notice that the vessel was not to pay it."

In *The Iris*, 100 Fed. 104, 109 (cited by this court in its typewritten opinion) it was said:

"The charterer of a vessel, who has no interest in her hull except for a temporary use under

the charter, cannot be said to be procuring supplies at his own charge if he procures them under such circumstances as would impose a lien on what is the property of the person who lets the vessel."

Surely this court cannot mean to say that any principle of law justifies the conclusion that a man's property is not immune from lien for a debt which the man himself is not required to pay!

IV.

This court held that "by reason of the provision that the charterer will hold the owner harmless from all liens against the vessel, there is an implication of authority on the part of the charterer to incur such expenses on the credit of the vessel".

The court cites no authority to support this proposition. The Circuit Court of Appeals for the Seventh Circuit reached precisely the contrary conclusion in *Northwestern Fuel Co. v. Dunkley-Williams Co.*, 174 Fed. 121, where the court said:

"The attempt to construe the language of the charter-party so as to give libellant the benefit of the clause prohibiting liens to accumulate in excess of \$1000 we deem without merit. Appellee was entitled under the agreement to receive the Potesky free of all liens. The \$1000 clause served its mission when it placed it within the power of appellee to enforce the forfeiture clause. It was evidently placed in the charter-party for the benefit of appellee, and not for the solace of those furnishing supplies

without reasonable investigation as to responsibility.”

See also:

The City of Milford, 199 Fed. 956;

The Gen. J. A. Dumont, 158 Fed. 312;

The Golden Rod, 151 Fed. 6;

The Surprise, 129 Fed. at page 880. .

Dated, San Francisco,

October 31, 1917.

Respectfully submitted,

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*Counsel for Appellant
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CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

MARCEL E. CERF,

*Of Counsel for Appellant
and Petitioner.*

